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APPENDIX

Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED
JANUARY 10, 1972
CERTIORARI GRANTED APRIL 3, 1972

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IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF VIRGINIA

DOCKET ENTRIES

1970

Jan. 7
Filed PETITION TO ENFORCE INTERNAL REVENUE SUMMONS with attachments. Issued summons and delivered same to Marshal for service returnable 10 days from date of service.

Jan. 8
Filed and entered order to show cause returnable 1-23-70. Delivered to Marshal for service.

Jan. 14
Filed Marshal's return on summons and Order to Show Cause executed on Shaffer on January 9, 1970.

Jan. 19
Filed ANSWER TO HAROLD L. SHAFFER with certificate of mailing noted thereon.

Jan. 19
Filed MOTION TO INTERVENE AS RESPONDENT and ANSWER OF INTERVENER RESPONDENT with certificate of mailing noted on each.

Feb. 27
Filed FINDINGS OF FACT AND CONCLUSIONS OF LAW. Certified copies to counsel of record.

Feb. 27
Filed and entered order dated February 25, 1970, wherein it is ADJUDGED, ORDERED and DECREED that respondent, Harold L. Shaffer, should be and he hereby is, dismissed from this proceeding. It is further ORDERED that the motion to intervene Lillian V. Couch be granted; and it is further ORDERED that John G. Rocovich, Jr., Esquire, appear before the petitioner, Edward F. Jennings, at the U. S. Attorney's Office, Roanoke, Va. for the purpose of producing for examination

and/or copy by photostating copy or other mechanical means of reproduction the books, etc. as set forth in said order. In the event the petitioner and Mr. Rocovich cannot mutually agree on a time and place, then they are to appear as set forth in said order. It is further ORDERED that the respondent, Harold L. Shaffer, shall appear before the petitioner Jennings at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968. Upon oral request of Mr. Rocovich, and with consent of counsel for the petitioners, a stay of execution of this order is granted for a period of thirty days from the date of entry of same to permit Mr. Rocovich the opportunity to file an appeal from this final order. Copies certified as directed and recorded in Civ. O. B. 27, page 76.

March 6
Filed NOTICE OF APPEAL and copy certified to James G. Welsh, Asst. U. S. Atty. this date.

March 13
Filed Transcript of proceedings held 2-2-70.

April 9
Filed Bond for Costs on Appeal in the penal sum of $250.00 with The Travelers Indemnity Company as surety thereon. Power of Attorney attached thereto.

April 10
Mailed Record On Appeal to the Clerk of the United States Court of Appeals for the Fourth Circuit, Richmond, Virginia. Copy of index, docket entries and transmittal letter forwarded to Leigh B. Hanes, Jr., Esq., U. S. Attorney; to John M. Dowd, General Litigation Section, Tax Division, Department of Justice, Washington, D. C. and to John G. Rocovich, Jr., Martin, Hopkins and Lemon, Sixth Floor Boxley Building, Roanoke, Virginia, counsel for Mrs. Couch.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 14,546

United States of America, and
Edward F. Jennings, Special
Agent, Internal Revenue Service,

Appellees

versus

Lillian V. Couch,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Ted Dalton, District Judge.

(Decided October 12, 1971.)

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

John G. Rocovich, Jr., (Claude D. Carter, and Martin, Hopkins, and Lemon on brief) for Appellant, and Joseph M. Howard, Attorney, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Lee A. Jackson and John M. Brant, Attorneys, Department of Justice, and Leigh B. Hanes, Jr., United States Attorney, and James G. Welsh, Assistant United States Attorney, on brief) for Appellees.

PER CURIAM:

From 1955 until the present controversy arose, the intervenor, Mrs. Couch, regularly delivered all of her financial books, records, and documents to her accountant, Mr. Shaffer, so that he might compute and fill out her income tax returns. These records were thereafter stored by the accountant in his office. In 1969 an Internal Revenue agent investigating Mrs. Couch's returns for the years 1964 through 1968 requested, and was permitted to review those records. During that investigation the agent became suspicious of fraudulent activity so he sought the aid of a special agent. It was customary procedure to have a special agent associated to investigate a suspected crime. Upon arrival, the special agent, Mr. Jennings, gave Mrs. Couch the *Miranda* warnings. She thereafter instructed her accountant not to permit further examination of the records.

Pursuant to authority vested in him by 26 U. S. C. A. §§ 7402 and 7604, Special Agent Jennings subpoenaed the accountant to present the records in his possession and to testify about his connected activities. Instead of complying, the accountant delivered the records to Mrs. Couch's attorney as she instructed. Thereupon, Special Agent Jennings instituted this action to enforce compliance with the subpoena. The lower court ordered the records produced, and appeal was taken from that order.

The intervenor-appellant sets out two alleged infirmities in the decision, but we find them to be without merit. She first asserts that the statutory authorization for the subpoena is strictly limited to civil suits so that its use was improper in the present case which is po-

tentially criminal. The subpoena power is not so narrowly restricted, however, for it is well-recognized that the subpoena is proper as long as the investigation retains a legitimate civil purpose. See *Donaldson v. United States,* 400 U. S. 517; *United States v. Giordano,* 8 Cir., 419 F. 2d 564; *United States v. Ahmanson,* 9 Cir., 415 F. 2d 785; *United States v. Hayes,* 7 Cir., 408 F. 2d 932. The District Court found after a hearing that there was "a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud * * *."

The intervnor also attempted to encompass the records within her Fifth Amendment privilege against self-incrimination. The answer to this contention lies in the fact that the records were not in the intervenor's possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records. They had passed from the sphere of privilege surrounding her, for there was no accountant-client privilege. The present situation is readily distinguished from the case upon which the intervenor relies, *Stuart v. United States,* 5 Cir., 416 F. 2d 459. The testimony there disclosed that the suspect had delivered her records to the accountant for the sole purpose of providing a more convenient time and location for conducting the pending investigation.

Affirmed.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, Petitioners	)	
v.	)	
HAROLD L. SHAFFER, Respondent	)	CIVIL NO. 70-C-3-R
v.	)	
LILLIAN V. COUCH, Intervenor	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on to be heard on the petition and answers thereto, on the Order to Show Cause entered by the Court on January 7, 1970, the hearing thereon having been reset and held on February 2, 1970, and the Court having heard the testimony elicited, having examined the exhibits admitted into evidence, and having heard argument of counsel, and being fully advised in the premises, therefore enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action brought by the petitioners for the purpose of enforcing an Internal Revenue Service summons issued to the respondent, Harold L. Shaffer.

2. The petitioner, Edward F. Jennings, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director in Richmond, Virginia, with post of duty in Roanoke, Virginia.

3. The petitioner, Edward F. Jennings, in his capacity as a Special Agent is conducting a continuing and joint investigation with Revenue Agent Dennis L. Groves for the purpose of ascertaining the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

4. On August 18, 1969, as part of the investigation described in paragraph 3 above, an Internal Revenue Service Summons, a copy of the original of which was admitted into evidence as Respondent's Exhibit 1, was issued by the petitioner, Edward F. Jennings, directing the respondent, Harold L. Shaffer, to appear before the said Edward F. Jennings on September 2, 1969, at 9:30 a. m. to testify and to produce for examination certain books, records, and documents all of which are described in the summons.

5. On August 18, 1969, the summons described in paragraph 4 above, was served on the respondent, Harold L. Shaffer, by the petitioner, Edward F. Jennings, by handing a copy thereof to Harold L. Shaffer.

6. That the respondent, Harold L. Shaffer, has served as the tax consultant for the taxpayer, Lillian V. Couch, from 1955 to the present and has prepared her tax returns for each year from 1955 to the present.

7. The respondent, Harold L. Shaffer, while serving as tax consultant to the taxpayer, Lillian V. Couch, received from her and thereafter maintained continuous possession of the various books, records and documents described in the summons until September 2, 1969; these records, books and documents were utilized by Harold L Shaffer for the purpose of preparing the tax returns of Lillian V. Couch for the years 1955 to the present.

8. That on August 18, 1969, Harold L. Shaffer was in possession and custody of the books, records and documents which are described in the summons for the years 1964 through and including 1968.

9. That on September 2, 1969, the respondent, Harold L. Shaffer, refused to produce the books, records and documents and to testify as required by the summons on the ground that he had delivered the papers, etc. to Mrs. Couch's attorney.

10. That on September 2, 1969, the respondent, Harold L. Shaffer, turned over the books, records and documents requested by the summons to John G. Rocovich, Jr., the attorney for Lillian V. Couch.

11. John G. Rocovich, Jr., the attorney for the taxpayer, Lillian V. Couch, is presently and at all times since September 2, 1969, has been in possession of the books, records and documents requested by the summons.

12. On January 7, 1970, the petitioners filed this action for the purpose of judicially enforcing the Internal Revenue Service summons.

13. The respondent filed his answer to the petition on January 19, 1970.

14. On February 2, 1970, the Court granted the motion of Lillian V. Couch to intervene.

15. It is necessary for Special Agent Edward F Jennings to examine the books, records and documents sought by the summons described in paragraph 4 above and to take the testimony of the respondent, Harold L. Shaffer, in order to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U. S. C. Sections 7402 and 7604.

2. The taxpayer may intervene to assert her rights under the Fourth and Fifth Amendments to the Constitution of the United States.

3. The petitioner, Edward F. Jennings, as a duly commissioned Special Agent of the Internal Revenue Service is empowered to issue Internal Revenue Service summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U. S. C. 7602, and Treasury Regulation 301.7602-1 (26 C. F. R. 301.7602-1).

4. The Internal Revenue Service summons involved in this case was properly issued to and served upon the respondent in this case.

5. The Internal Revenue Service summons described in paragraph 3 above, was issued as part of an investigation which is being conducted pursuant to a legitimate purpose, namely to determine the correctness of income tax returns and the possibility of fraud filed by Lillian V. Couch for the years 1964 through and including 1968.

6. That Revenue Agent Dennis L. Groves and the petitioner, Edward F. Jennings, are conducting a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

7. A special agent of the Internal Revenue Service is empowered to issue an Internal Revenue Service summons pursuant to Section 7602 even though the evidence so obtained may ultimately be used in a criminal prosecution should one ever be instituted.

8. The records and testimony sought by the Internal Revenue Service summons are necessary, material and relevant to a determination of the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

9. At the request of the taxpayer and after service of the summons upon him the respondent turned the records over to John G. Rocovich, Jr.

10. The respondent was in possession of the books, records and documents requested in the summons at the time of service of summons and should have requested the guidance of the Court before taking any action with

respect to turning over the records to Attorney Rocovich, (*United States* v. *Bryan,* 339 U. S. 323, 331 (1950); *Blair* v. *United States,* 250 U. S. 273, 281 (1919); *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932).

11. The rights of all parties with respect to the records involved in this proceeding are fixed and determined on the basis of the rights as they existed at the time the summons was served.

12. Since no search or seizure of any books, records or documents in the possession of the taxpayer are involved in this proceeding, the provisions of the Fourth Amendment of the United States Constitution are not applicable here.

13. Since, at the time the summons was served, the taxpayer, Lillian V. Couch, was not in possession of the books, records and documents described in the summons, she may not assert any Fifth Amendment privilege against self-incrimination as a bar to the enforcement of the summons.

14. Since the records in question were turned over to an officer of this Court, namely, John G. Rocovich, Jr., who now has possession thereof, this Court, acting under its general equity powers, may order Mr. Rocovich to produce those records on the same basis and on the same terms as it could were the records still in the possession of the respondent.

15. An order should be issued requiring the respondent to appear and give testimony with regard to the determination of the correctness of the income tax

returns of Lillian V. Couch for the years 1964 through and including 1968.

Enter:

Ted Dalton
February 25, 1970

A TRUE COPY, TESTE:
Virginia M. Ayers, Clerk

By: Carolyn Brammer
Deputy Clerk

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA :

and

EDWARD F. JENNINGS, :
Special Agent,

Petitioners :

v. : Civil Action No.70-C-3-R

HAROLD L. SHAFFER, :
Respondent

and :

LILLIAN V. COUCH,
Intervenor Respondent :

Proceedings held in the United States District Court for the Western District of Virginia, Roanoke Division, Roanoke, Virginia, beginning at 1:05 P. M. on February 2, 1970.

Before:

HONORABLE TED DALTON, CHIEF DISTRICT JUDGE

Appearances:

JAMES G. WELSH, ESQ.
Assistant United States Attorney
Western District of Virginia
Roanoke, Virginia
and

JOHN M. DOWD, ESQ.
and

PARK T. ZIMMERMAN, ESQ.
Attorneys
General Litigation Section
Tax Division, United States Department of Justice
Washington, D. C.
counsel for the Petitioners

EUGENE STREET, ESQ.
Shenandoah Building
Roanoke, Virginia
counsel for the Respondent, Shaffer

JOHN G. ROCOVICH, JR., ESQ.
Martin, Hopkins and Lemon
Sixth Floor, Boxley Building
Roanoke, Virginia
counsel for the Respondent, Couch

WITNESSES

Name	Direct	Cross	Red.	Rec.
Shaffer, Harold L.	2	6	11 33	11 34
Groves, Dennis L.	13	15	—	—
Jennings, Edward F.	21	27	—	—

page [1] Court convened at 1:05 P. M.

THE COURT: The Clerk will call the case.

THE CLERK: Number 70-C-3-R, United States of America and Edward F. Jennings, Special Agent, Internal Revenue Service, versus Harold L. Shaffer.

MR. WELSH: Your Honor please, this matter is a tax matter that is being handled by the Department of Justice. The gentlemen from the Tax Division are Mr. John Dowd and Mr. Tom Zimmerman, who will handle the Government's case.

THE COURT: We are glad to have Mr. Dowd and Mr. Zimmerman, and the Clerk will recite that they are appearing here for the Government.

Call your first witness.

MR. DOWD: Your Honor, in the interest of time, the United States will rely on the affidavit of the Special Agent, and I believe we are here on your order to show cause to the respondent. So, that's initially what the Government will do in this case. If Your Honor would like to hear from the Special Agent, we would be happy to put him on, but I don't think it's necessary.

THE COURT: What is the substance of the affidavit? I think I know in a general way.

MD. DOWD: The affidavit, the substance of it is

page [2] that they issued the summons to Mr. Shaffer, who had possession of the books, records and documents of the taxpayer, Lillian V. Couch, also known as Lillian V. Aleshire, I believe it is, and that these documents are necessary to determine the correctness of the tax returns of Mrs. Couch, and he did it on a certain date, and the respondent, Mr. Shaffer, refused to comply with the requirements of that summons.

THE COURT: All right, Mr. Street.

MR. STREET: Mr. Shaffer, would you take the stand, please?

MR. HAROLD L. SHAFFER, the respondent in this action, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STREET:

Q Would you state your name to the Court, please, sir?

A Harold L. Shaffer.

Q What is your residence address, Mr. Shaffer?

A 2233 Cantle Lane, Southwest.

Q And what is your occupation, Mr. Shaffer?

A Tax consultant.

Q Do you have any relationship with a Mrs. Couch?

A Only on a relationship of preparing her income tax returns in the past.

page [3] Q Did you ever, at any time, have possession of any books or papers belonging to Mrs. Couch?

A Yes, sir.

Q When did you have possession of such books?

A Up until, I don't know the exact dates, but up until the return of this subpoena that was given to me.

Q At the time that you had these books and papers in your possession, were they ever viewed by the Internal Revenue Service Agents?

A Yes, sir.

Q Who looked at the books from the Internal Revenue Service?

A Mr. Dennis Groves.

Q When did he view the books and records?

A I don't know the exact date now.

Q Did he view them once or more than once?

A He was there several days.

Q He was "there," where?

A At the office that I had at the time on Peters Creek Road.

Q Did you ever raise any objection to him viewing the books and records of Mrs. Couch?

A No, sir.

Q Did any other Internal Revenue Agent ever ask to view the books and papers of Mrs. Couch?

page [4] A Ask to view them?

Q Yes.

A No, sir.

Q Did you ever refuse permission to any Internal Revenue Agent to look at the papers and books in your office?

A No, sir.

Q I show you a copy of a summons here and ask you if you received this summons.

A Yes, sir.

Q Would you read it to the Court, please?

A In its entirety?

THE COURT: I have a copy, I think, here. "All books, records . . ."

MR. STREET: Yes, sir.

THE COURT: I have a copy.

MR. STREET: All right, sir.

THE COURT: It's in the record.

Q The date on this summons, I believe, for your appearance was September the 2nd. Is that correct?

A Yes, sir.

Q And on September the 2nd at 9:30 A. M., which is the time stated in the summons, did the Internal Revenue Agent, Mr. Jennings, appear at your office at 9:30 A. M.?

A No, sir.

Q What time did he appear?

page [5] A A little after 10:00 o'clock. Ten—Somewhere—Fifteen after 10:00, somewhere along there.

Q Did he ask you for the books and papers of Mrs Couch at that time?

A Yes, sir.

Q Did you give them to him?

A No, sir.

Q Why not?

A They were not in my possession at that time.

Q Where were they?

A With the attorney of Mrs. Couch.

Q Why did he have them?

A Because she instructed me to turn her records over to him.

Q Are you willing to testify to the Internal Revenue Agents of any knowledge that you have concerning Mrs. Couch's records?

A Yes, sir.

Q Did you ever refuse to turn over the records to the Internal Revenue Agents while they were in your possession?

A Yes, sir.

Q When was this?

A I think Mr. Jennings and Mr. Groves were—had requested the records to be turned over to them, but on advice of Mrs. Couch, she instructed me not to turn them over and

page [6] turn them over to her attorney.

Q Did you refuse to turn the records over to them before or after you received the subpoena?

A Before, sir.

Q At this time you refused to turn the records over to them, did you refuse to let them look at them?

A No, sir.

Q At this time then you were willing to let them look at them, but you wouldn't give them to them to take away from your office. Is that correct?

A That's correct.

MR. STREET: That's all the questions I have, Your Honor.

MR. DOWD: May I see the subpoena that is part of the record?

CROSS EXAMINATION

BY MR. DOWD:

Q Mr. Shaffer, do you have the duplicate copy that the Special Agent gave you of his subpoena?

A Not—Not in my possession today. I have it, sir.

Q I ask you to take a look at it, Mr. Shaffer. Would you tell me if there is another page that goes on this subpoena?

A Another page?

page [7] Yes. I show you a blank—a blank summons which is a duplicate and ask you if you recognize that that is more akin to the summons you received from Special Agent Jennings.

A You mean this print on the back?

Q Yes.

A Yes, sir.

Q It did have this print on the back?

A Right.

Q Mr. Shaffer, how long have you been a tax consultant for Mrs. Couch?

A How long?

Q Yes.
A Up until—I don't know the exact date, sir.

Q Has it been a year, five years, ten years?
A Oh, it has been since 19—approximately 1955, I suppose.

Q 1955?
A '55, '56.

Q I see. When you did her work, did she turn over books and records and documents to you?
A Yes, sir.

Q And from those books and records and documents, you took information and worked up her income tax return. Is that correct?
A That's right, sir.

page [8] Q Could you describe some of the documents and books and records you had in your possession?
A Bank statements, daily—daily reported sales, and the necessary information, payroll records and what have you.

Q I see. On the date that this summons was issued to you, did you have these books, records and documents in your possession?
A Yes, sir.

Q Mr. Shaffer, I want you to take another look at the face of this summons and down under the time for

the return date, would you read that statement into the record, please?

A "Failure to comply . . ."?

Q That's correct.

A "Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience."

Q Were you aware of that statement when you got the summons?

A Yes, sir.

Q Did you read that statement?

A Yes, sir.

page [9] Q Did you also read the language which is not on this summons that is part of the record here, but which I showed you from a blank, the statute, 7602, 7604 (a) and (b), 7605 and 7210?

A Yes, sir.

Q You are aware of these?

A Yes, sir.

Q The language in here. When did you decide to turn these records over to Mr. Rocovich, the attorney for the taxpayer?

A On the advice of Mrs. Couch. She called me and told me that she had engaged an attorney and asked me to turn all records over to him.

Q I see. So on September 2nd you did refuse to

turn over the books, records and documents to the Revenue and Special Agents. Is that correct?

A I did, because I didn't have them.

Q So you disposed of them before the return date. Is that correct?

A That's right.

Q At what time before the return date did you dispose of them?

A I don't know exactly.

Q Was it on September 1st or September 2nd?

A Yes, September the 2nd, I suppose.

page [10] Q September the 2nd?

A Yes, sir.

Q At what time?

A 8:30.

Q I see. Did you receive a phone call on that morning from Special Agent Jennings, telling you that he would be late for the appointment at your office?

A Yes, sir.

Q And did you agree for that delay in the return of the summons?

A Well, he just called and said he'd be late.

Q I see.

A And I said, "Well, we're here waiting for you."

Q I see. Where are these records now? Do you know?

A I assume with Mr. Rocovich.

MR. DOWD: If I could have just one second, Your Honor.

Q On September 2nd, in the morning at 8:30, where were these records, in fact? Where was the physical location of these records?

A In the office of—on Peters Creek Road.

Q Your office?

A No, sir. At that time, yes, my office, temporarily.

page [11] Q They were in your office, though. Is that correct?

A That's right.

MR. DOWD: Your Honor, we have nothing further of this witness.

MR. STREET: Your Honor, I have one question.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. STREET:

Q Sir, were any of these records that we have been referring to here made by you? Were any of the figures or the books or the records made by you, constructed by you?

A No, sir.

MR. STREET: That's all.

MR. DOWD: Your Honor, if I could be permitted one more question.

RECROSS EXAMINATION

BY MR. DOWD:

Q Do you utilize work papers in developing the information from the books and records of Mrs. Couch to put on the tax return?

A I didn't understand you.

Q Do you develop—Do you use work papers of your own? Do you take the information and put it on work papers and then eventually put the figures on the tax return?

page [12] A No, sir.

Q You don't use any work papers at all?

A No, sir.

Q Let me ask you, Mr. Shaffer, this is a copy of your Answer that was filed with this Court. Is this a copy of the Answer?

A Yes, sir.

Q Would you read paragraph ten of that Answer for the Court please?

A Paragraph ten?

Q Yes, please.

A "That he does not have nor has he ever had any work papers or other books, records, bank statements, cancelled checks, deposit ticket copies, or other pertinent documents pertaining to the tax liability of Lillian V Couch as his sole and exclusive property, which were created by his own efforts; and to the extent that he may have owned or created such documents, they were lost,

disposed of or destroyed long before service of said summons."

Q Do I take that to mean that you did have some work papers, the last phrase or sentence in that paragraph?

A No, sir.

Q How could they be lost, destroyed or disposed of, if you didn't have them in the first place?

A (no response)

page [13] MR. DOWD: I have no further questions, Your Honor.

THE COURT: All right. I notice here (You may be excused.) a motion to intervene on behalf of Mrs. Couch by her attorney, Mr. Rocovich. Is there any objection on the part of the Government?

MR. DOWD: No, we have no objection to the motion to intervene, Your Honor.

THE COURT: All right, the Court permits the intervention of Mrs. Couch in the proceedings, and we're ready for you to go ahead.

MR. STREET: Your Honor, I would like to call one more witness.

THE COURT: All right.

MR. STREET: Mr. Groves, please.

MR. DENNIS L. GROVES, having been called as an adverse witness on behalf of the respondent,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STREET:

Q Would you state your name to the Court, please, Mr. Groves?

A Dennis L. Groves.

Q What is your occupation, Mr. Groves?

page [14] A I'm occupied as an Internal Revenue Agent in Roanoke, Virginia.

Q Have you ever had any reason to come in contact with Mr. Shaffer, the defendant in this case?

A Yes, I have.

Q In connection with any books or records of a Mrs. Couch?

A Yes, and in regards to an examination of Mrs. Couch's books and records of her income tax returns.

MR. STREET: Your Honor, I ask that this witness be considered an adverse witness to the defendant.

THE COURT: Very well.

Q Did you examine these books and records of Mrs. Couch at Mr. Shaffer's office?

A To a certain degree, yes.

Q What do you mean, "to a certain degree?"

A Upon limitations there was an examination of

the taxpayer's records which were made available at Mr. Shaffer's office.

Q He did make them available then at his office for your examination?

A Yes, he did.

Q Did he ever object to you coming to his office and examining the books?

A No, sir.

page [15] Q At any time, to you examining the re-records at his office?

A Not to me individually. No, sir.

Q And how long would you say that you spent in his office examining these books at different times?

A I was there off and on for a period of, I would say probably two to three days; not necessarily in that sequence, but a period of two or three days, sir.

Q Did he make his office available for your use?

A Yes, he did.

MR. STREET: Thank you very much. That's all the questions I have, Your Honor.

CROSS EXAMINATION

BY MR. DOWD:

Q Mr. Groves, did you look at all the records that he had in the office?

A Yes, I looked at all the records that he furnished me. Yes.

Q That he furnished you?

A Yes, sir.

Q Was there any indication that there were more records?

A Sir, additional records were requested for a subsequent year under examination, and to date these records I have not seen.

page [16] MR. DOWD: I see. I have no further questions, Your Honor.

THE COURT: All right, Mr. Groves, you may be excused. Do you have any questions?

MR. ROCOVICH: Yes, sir.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ROCOVICH:

Q I believe you stated you examined the records over a two or three day period. Why did you stop examining the records?

A I haven't stopped.

Q Well, why did you see fit to request the assistance of Mr. Jennings?

A Due to certain findings which I encountered during my examination of those records.

Q Now which findings would they be?

A Pertaining primarily to indications of substantial understatement of income.

Q More specifically, what kind of indications?

MR. DOWD: Object, Your Honor. Some of

this information is prohibited by law from being given. 7213 prohibits an agent to—

THE COURT: Well, now, does this come within that ambit?

page [17] MR. DOWD: I think it does, Your Honor. I think he has said there were indications of fraud or irregularity. I don't think we ought to go any further.

THE COURT: "Understatement of income", I understood him to say.

MR. DOWD: Yes, Your Honor.

THE COURT: All right, let me hear your question again.

MR. ROCOVICH: All right.

Q What specific details led you to believe that the taxpayer had understated her income?

THE COURT: I believe I'll let him answer it, if he can, in substance, generally, not to go into details, because we cannot try that matter here today.

A Through an alternative tax computation, based on the information in the taxpayer's records, an indication of a substantial understatement of income was found

Q That's gross income, I suppose you—

A Understatement of gross income. Yes, sir.

Q What general area primarily led you to believe there might be such an understatement?

A Excessive spending over known receipts.

Q All right. Then you—How long after you suspected—Well, you say you called in Mr. Jennings because

page [18] you suspected some criminal possibilities. Is that correct?

THE COURT: He didn't say that.

MR. DOWD: He didn't say that.

THE COURT: You're putting words in his mouth.

MR. ROCOVICH: I withdraw that.

Q Why did you call in Mr. Jennings?

A Under the Internal Revenue regulations, under which I must work, when I find an indication of an understatement of income, I am required to report this to my superiors, and in turn, it is reported to the Intelligence Division.

Q Do you understand this regulation to mean that if you suspect a crime, you are supposed to turn this over?

A No, sir, I don't believe it says, "to suspect a crime." It says that if there is—if I find that there is some reason to believe that the income reported on the return is not correct as reported. My primary purpose is to determine the correct tax liability.

Q Well, how long after you suspected this deficiency, say, in the taxpayer's statement of gross income, how long did you continue to examine the records? When you said you worked on them two or three days, I was just wondering—

A This work was done previous to this—this finding. This—In other words, the work—the examination which I made of the records, my determination, based on the facts that

page [19] I had found while working in Mr. Shaffer's office on these days, led me to this conclusion. It was at this point that the case was referred to the Intelligence Division and my superiors.

Q Well, then you say you were there three days. Did you work on them for two days, then start to suspect some impropriety and then continue for another day, just to be sure that you were right?

A Basically, I would say this is correct. I wouldn't say I worked exactly two days before I suspected anything or a day and a half or three days. It was part of this two or three day period. At the moment, I don't recall exactly how many days I worked at Mr. Shaffer's office.

Q Then you proceeded a little further, confirming your suspicions.

A This is correct.

Q Right. So after the point at which you suspected some impropriety, you continued to work for a little while. Is that right, basically?

A I referred the information to my superiors at that point.

MR. ROCOVICH: Thank you.

MR. STREET: I want to ask one more question, Your Honor.

page [20] REDIRECT EXAMINATION

BY MR. STREET:

Q Mr. Groves, is it true, as Mr. Dowd stated here in his objection, that you suspected fraud before you

turned—before you called in Mr. Jennings? Was his statement correct?

A I wouldn't say necessarily that I suspected fraud. I found that there was, to me, a substantial understatement of gross income. It is not for me to determine whether this is fraud.

Q No, I didn't ask you if you thought there was fraud. I asked you if it was true—was his statement true, that you suspected fraud.

A This is true.

MR. STREET: That's all

MR. DOWD: We have no further questions, Your Honor.

MR. ROCOVICH: I would like to call Mr. Jennings.

THE COURT: Very well. Come around, Mr. Jennings.

page [21] MR. EDWARD F. JENNINGS, a petitioner in this action, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROCOVICH:

Q Mr. Jennings, what is your occupation?

A I'm a Special Agent with the Intelligence Division, Internal Revenue Service.

Q Who is your group supervisor?

A Robert Smoot.

Q Briefly, what is the mission of the Intelligence Division?

A To gather evidence and to make a recommendation based on that evidence, on the possibility of a criminal tax violation.

Q So then every case in which you are involved, involves a possibility of a criminal prosecution?

A Yes, sir.

Q And that's your sole function?

A No, sir.

Q What are your other functions?

A Well, in order to arrive at a conclusion as to a possibility of tax fraud, first—you first have to determine is the tax liability on the return correct, or is the return correct.

page [22] Q Right.

A Then that is a part of the ultimate determination as to whether or not there is fraud involved.

Q Then basically, if there wasn't—if there wasn't criminal fraud suspected, you wouldn't be involved. Is that right?

A That's correct.

Q Mr. Jennings, what is a case assignment sheet in the Intelligence Division?

A Well, it is a sheet of—It is a form that they prepare in Richmond, which contains our number, for bookkeeping purposes, and contains—if the case would be assigned to me, it would contain my name and the date that it was assigned and the source of the case.

Q And was a case assignment sheet prepared prior to your entry into this matter? Was that the way you became involved?

A As far as technically, exactly when that case assignment sheet was prepared, I just don't know at this time. However, we can be assigned an investigation while the case assignment sheet is being prepared. If the investigation has been authorized and my—I will have to guess at this. My guess is that that case assignment sheet had been prepared and given to me in this particular instance.

Q Well, what was the source of the case on that

page [23] case assignment sheet?

A The source of the case was Audit Division.

Q Say anything else as to why there was suspected fraud or—

A My best recollection is that it stated that there was an understatement of gross receipts.

Q All right. Basically, what is the difference between a Special Agent and an Internal Revenue Agent?

A An Internal Revenue Agent, according to my understanding, makes audits of income tax returns, and they are concerned with determining the correct tax liability of any given taxpayer. That's generally what they do.

Q Yes.

A My primary function is to investigate the possi-

bility of income tax fraud against the revenue of the United States.

Q Criminal fraud, that is, basically?

A Criminal fraud. Correct. Now, in conjunction with that, we investigate civil fraud also, but the primary function you asked, I believe.

Q All right. You are familiar with Internal Revenue News Release 941, aren't you, involving warnings to taxpayers?

MR. DOWD: I object to the relevance. I don't know how it is relevant here.

page [24] THE COURT: Well, I take it that it is a regulation or a statement by somebody who worked in the Internal Revenue Department, his views of what the taxpayer should be warned of. Is that it?

MR. ROCOVICH: Yes, sir. It is a release directing Special Agents to give warnings similar to *Miranda*.

(Thereupon the Court was handed the document.)

THE COURT: Well, did Mr. Jennings, as Special Agent, see Mrs. Couch?

MR. ROCOVICH: Yes. I just want to bring this out in further support of my contention that this is a criminal investigation which he was conducting.

MR. DOWD: Your Honor, we might be able to save some time here. We'd be happy to stipulate that Special Agent Jennings gave Mrs. Couch a warning similar to *Miranda* when he met with her.

That might save the whole thing. We have nothing—

THE COURT: Well, he wants to put this in the record, this direction of procedure that was enacted on November 26, 1968. You wish to put this in the record?

MR. ROCOVICH: Right.

THE COURT: And then you wish to question Mr. Jennings about it. All right. Go ahead. I'll

page [25] let that be filed Exhibit Number 1 for Mrs. Couch.

(Copy of IRS News Release IR-949, November 26, 1968, was received in evidence as Intervenor Respondent, Couch, Exhibit Number 1.)

Q Are you familiar with Internal Revenue Service News Release IR-949?

A I'm not familiar with that under that title, no. If I'm permitted to read it, I can tell you whether I'm familiar wih the context.

THE COURT: Yes, you may read it.

A (continuing) I'm aware that in some cases they —in some—Some people don't think that we are required to give the warning. Yes, I'm aware generally of what that contains.

Q All right. Did you give a warning to Mrs. Couch?

A Yes, sir.

Q Could you tell us basically what you warned her?

A I can tell you exactly what I warned her.

Q All right, if you would do that.

A This is a card which I carry in my credentials, and in this instance I had this card and read it to her. The first two words are, "Show credentials," which I did, and then I said, "As a special agent one of my functions is to investigate the possibility of criminal violations of the Internal Revenue Laws. In connection with my investigation of your tax

page [26] liability, I would like to ask you some questions. However, first I advise you that under the Fifth Amendment of the Constitution of the [United States] I cannot compel you to answer any questions or to submit any information if such answers or information incriminate you in any way. I also advise you that anything you say and any information you submit may be used in any criminal proceeding undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

THE COURT: Give that to the Clerk and let a photostatic copy be made and placed in the file as Exhibit Number 2 for Mrs. Couch.

(Copy of statement as read by witness was received in evidence as Intervenor Respondent, Couch, Exhibit Number 2.)

Q As you understand the Commissioner's regulations, at what point is an Internal Revenue Agent supposed to call for help, so to speak, or request a Special Agent be sent in?

A I can't really answer that question, because I don't know. It varies from agent to agent. I can give you an opinion.

Q Fine.
A That's all it would be.

Q All right.
A Generally, on the first indications of fraud.

page [27] Q Criminal fraud, that is.
A Fraud.

Q All right.
A It is up to the Special Agent to determine whether—whether these indications are fraud or not. This is part of our investigation.

Q Did you ever see any of the Couchs' records since you—Have you looked—Have you ever seen any of the Couchs' records?
A Yes, I have. May I clarify that—

Q Yes, certainly.
A —to some degree? I have seen what were identified to me as Couchs' records in a box. I have not seen any writings or anything of that nature. I have not examined them or perused them in any manner. I've only seen the records, and they were identified to me as Couchs' records in a box only.

MR. ROCOVICH: I don't have any further questions, Your Honor, at the moment.

CROSS EXAMINATION

BY MR. DOWD:

Q Mr. Jennings, under what authority do you have to issue an Internal Revenue summons?

A Well, our authority is given to us as a delegate of the Secretary of the Treasury.

page [28] Q I see. Is that pursuant to Section 7602 of the Internal Revenue Code?

A That's correct.

Q And is one of the purposes under that statute to determine the correctness of the tax return?

A Yes, sir.

Q Let me ask you, is that what you are doing here?

A Yes, sir.

Q Let me ask you, is Mr. Groves assisting you in this investigation?

A Yes, sir.

Q Why is he assisting you?

A Well, in accordance with our procedure, the Revenue Agent in a joint investigation is charged with the responsibility of determining the computation of the tax and the civil adjustments or civil features of the case.

Q If we could suppose for a moment, Agent Jennings, that—Let's suppose that this investigation was concluded. What possible results could come from the investigation, from this joint investigation with Revenue Agent Groves and yourself? What are the possibilities that could come out of it?

A There are—

Q Could there be no action at all?

A There are three possibilities; no action on our part as far as making a recommendation for prosecution; we

page [29] could continue in the case throughout, at which time we could make a recommendation with regard to the civil fraud penalty or not; and/or the other end of the scale is that we could recommend prosecution of the taxpayer for evading taxes.

Q So there could be no action taken. Is that correct?

A That's correct.

Q In other words, your examination could possibly exonerate the taxpayer. Is that correct?

A That's correct.

Q Of the suspicions.

A That's correct.

Q There could be an additional tax, a technical adjustment. Is that correct?

A That's correct.

Q There could be a criminal prosecution. Is that correct?

A Yes, sir.

Q Or there could be both. There could be a suit for civil liability and a criminal prosecution, could there not?

A That's correct.

page [30] Q Now, when fraud is suspected in a case, and suppose there is difficulty in really finding anything to confirm the suspicions, do you continue until you are satisfied that there is no fraud? In other words, what I am saying is: Isn't it true that the

Commissioner of Internal Revenue has got a right to satisfy himself that there is no fraud—

A Yes, sir.

Q —as well as that there might be fraud?

A Yes, sir. Yes, sir.

MR. STREET: Mr. Jennings, did you ever go—

MR. DOWD: Wait a minute. I'm not through.

MR. STREET: Excuse me.

MR. DOWD: Excuse me, Your Honor, I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. STREET:

Q Mr. Jennings, when did you see these books and papers that were reported to belong to Mrs. Couch?

A It was in the afternoon, between the hours of approximately 2:00 and 3:00 o'clock on August 15th, 1969.

Q And where did you see them?

A At the office at that time I understood was being occupied by Harold Shaffer and Emmett Sherrill.

Q Did you meet Mr. Shaffer that day?

page [31] A No, he was—he never did—We waited for him, and he never did show up.

Q Did Mr. Shaffer ever refuse to allow you to look at the books and papers in his office?

A Yes, sir.

Q When?

A The following Monday at approximately 8:30 A. M., August 18th, 1968.

Q August the 18th?

A. Yes, sir.

Q He refused to let you view them in his office?

A Yes, sir.

Q Did you ask to take the books out of his office at that time?

A My best recollection is that I did ask that, and I said also that if he wouldn't permit the records to be removed, that I had a microfilmer in the car that we could save som time if we took the microfilmer inside and microfilmed the records. This was denied.

Q Did you ask to view them without taking pictures? Did you ask to look at—to stay there in his office and look at them?

A Well, I can't say that I used those words. We were denied access to the records, and this is what we wanted. We were denied it.

page [32] Q But do I understand you correctly that you don't remember whether you asked him to sit there in the office and look at the records or not? Do you remember whether you asked him to allow you to remain there in the office and to look at the records, without taking pictures of them?

A My best reecollection is that we asked him—

Q Do you remember specifically?

A —if we could work on—work on the records,

and Shaffer replied that the taxpayer was going to get an attorney, and he couldn't let me see them.

Q He told you that he could not let you see them, period. Is that right?

A I believe that's right.

Q Are you sure?

A That's my best recollection.

Q Can you be positive?

A I can't be positive. No.

MR. STREET: Thank you, sir.

THE COURT: All right. Thank you, Mr. Jennings. You may take your seat.

Any further evidence?

MR. STREET: Your Honor, I would like to put Mr. Shaffer back on in rebuttal to that witness who was called by Mr. Rocovich.

THE COURT: All right.

Shaffer — redirect

Shaffer — redirect

page [33] MR. HAROLD L. SHAFFER, the respondent in this action, having previously been duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. STREET:

Q Mr. Shaffer, do you remember Mr. Jennings coming to your office the first time?

A Yes, sir.

Q Were you there?

A Well, the first time he came, I don't think that I was there.

Q The second time that he came, were you there?

A Yes, sir.

Q And what did he request of you at this time?

A He said at the time that they had facilities at the Internal Revenue Service for microfilming and photocopy machines and what have you, and he wanted to take the records to the Internal Revenue Service and work with them.

Q Did you understand him ever to ask you to view the records in your office?

A. No, sir.

Q Would you have allowed him to look at them in your office if he had asked?

A Yes, sir.

MR. STREET: That is all the questions I have.

[page 34] MR. DOWD: I would like to ask a question.

RECROSS EXAMINATION

BY MR. DOWD:

Q You stated earlier you had possession of these records. Right?

A Yes, sir.

Q And while under a subpoena that was issued to

you by Special Agent Jennings, you turned them over to Mr. Rocovich. Is that correct?

A That's right.

Q Why was that summons issued to you, do you know?

MR. STREET: Your Honor, I object to this cross examination. It does not relate to the questions I asked him on direct.

THE COURT: Well, anyway, he wasn't the one that issued the summons. That would be up to the Government to say why it was issued, wouldn't it?

MR. DOWD: I'll put it another way, Your Honor.

Q Isn't it a fact that the reason the summons was served on you was because you wouldn't produce the records and documents as requested by the Special Agent?

MR. STREET: Your Honor, I object to this on the same basis. He doesn't know why it was issued.

THE COURT: Well, I will let him answer the question.

pages [35-36] A I think it was. Yes, sir.

Q And it is a fact that on September 2nd, the date of the return date, you did not tell him you didn't have the records, you told him you couldn't produce them. Isn't that correct? That's all you told him. You just refused to produce them at that time. Isn't that correct?

A I didn't understand your question.

MR. STREET: Your Honor, I object. He

has already answered that question once and said he couldn't remember.

THE COURT: You wish to ask it again?

MR. DOWD: Yes, I do, Your Honor.

THE COURT: All right, go ahead.

MR. DOWD: Your Honor, we'll let it go. It's not important.

THE COURT: All right, you are excused.

MR. STREET: Your Honor, that is all the evidence we have.

MR. DOWD: We have some argument, Your Honor.

THE COURT: Very well.

MR. DOWD: Your Honor, I do not believe you had an opportunity to see the back of this summons.

THE COURT: Yes, I have.

MR. DOWD: This is different than the one you have, Your Honor.

page [37] THE COURT: Oh, that is not the one filed?

MR. DOWD: Yes, this is the one given to the taxpayer, Your Honor. We have already shown it to counsel.

THE COURT: Do you wish to file it in the record?

MR. DOWD: Yes, Your Honor, since we don't have the back. Oh, you do have the back. If we could attach it to—

THE COURT: Let it be filed as a part of Government Exhibit Number 1. Is that right?

THE CLERK: Yes.

(Document was attached to Government Exhibit 1.)

MR. DOWD: Your Honor, what we have here is a very — is a very simple thing actually. You have —7602 of the Internal Revenue Code is a statute which permits the Commissioner or his delegate, the Secretary or his delegate, rather, more specifically, the Commissioner of Internal Revenue and his agents, to examine tax returns to check the correctness of them, because very simply, if the Commissioner of Internal Revenue could not check the correctness, that is, the documents supporting—

THE COURT: Well, that's not — Nobody disagrees with that, do they?

MR. DOWD: Well, I don't know, Your Honor. I'd like to explain this, because I think it will take on — I'd like to explain this, if I could, so that we could handle this

page [38] matter of a question of a criminal investigation. What I'd like to say is that statute is not limited, and that the Special Agent and the Revenue Agent have authority under that statute to issue the summons and to examine the books and records, notwithstanding the fact that there may later be a criminal prosecution. As was stated in the case of *Boren v. Tucker*, the fact that there may be a prosecution doesn't necessarily mean there really will be. As we pointed out with the Special Agent on the stand, there are many possibilities that may come out of a criminal—this investigation

THE COURT: What I would first like to know is this: What were the duties of Mr. Shaffer here, the CPA, with reference to the papers? In other words, does—

MR. DOWD: The duties of Mr. Shaffer, Your Honor—

THE COURT: Wait just a minute. Does the Government have a right to issue the subpoena to the person who is holding papers for someone else's benefit and take them over without her consent?

MR. DOWD: Yes, Your Honor, the Government does. Section 7602 states:

> "To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of

page [39] the person liable for tax required to perform the act, or any other person the Secretary or his delegate may deem proper, . . ."

This is in 7602, subparagraph (2), Your Honor. This statute was explained in full to Mr. Shaffer, not only on the face of the summons, but on the back of the summons, and the incumbent penalty—

THE COURT: All right. Now, what do you want done about Mr. Shaffer's case? I understand it all.

MR. DOWD: Well, Your Honor, we're in a very difficult situation, because Mr. Shaffer does not have possession of the books and records. Apparently, Mr. Rocovich does, based on the testimony of Mr. Shaffer.

Your Honor, since Mr. Rocovich is part of this proceeding, we'd like to ask this Court to compel Mr. Rocovich to put these records back where they started when this subpoena was issued. For example, Your Honor, if the Congress issued a subpoena, say to Mr.

Shaffer to produce testimony and records, I'm sure Mr. Shaffer wouldn't disregard the will of Congress, which is what he has done here.

THE COURT: What benefit would it be to put them back in his hands, when what you really want is to turn them over to Mr. Groves and Mr. Jennings for investigation?

MR. DOWD: That's correct, Your Honor.

THE COURT: Well, I'm willing to do that. I'm

page [40] willing to do that. The question is: What are you asking about Mr. Shaffer's case?

MR. DOWD: Mr. Shaffer's case, Your Honor, if— if the Government can get the records, which is all we're interested in here, and his incumbent testimony—

THE COURT: All right.

MR. DOWD: —we have no — we have no complaint against Mr. Shaffer. Now, if we cannot, then we would have to feel free to ask this Court for a civil contempt order.

THE COURT: I understand your position, and I'll give Mr. Rocovich an opportunity to reply.

MR. DOWD: Very well.

THE COURT: Mr. Street, I take it there is no necessity for you to reply, because from what Mr. Dowd has said, we will dismiss the proceeding as to Mr. Shaffer.

I do want to say this, that I think that Mr. Shaffer acted in disregard of the summons. I think that he should have waited, (Here it is a matter that is coming into Court.) and let us say whether or not he should have turned the papers over. He had a summons

staring him in the face, and instead of running with the papers to the lawyer, he should have asked for the guidance of the Court in answer to a properly executed summons.

So, I am willing to go along with that.

Now, Mr. Rocovich, I have already indicated--

page [41] MR. STREET: Then with the understanding that my client is dismissed, I have nothing further.

THE COURT: Well, I say I think that that is what I will do. Now, I am willing to hear Mr. Rocovich. I have already indicated to Mr. Dowd that I thought that the papers ought to be produced. Now, if you can convince me otherwise, go ahead.

MR. ROCOVICH: All right. Well, I agree with Mr. Dowd on 7602, that it's clear that the Internal Revenue Service can examine returns for correctness. That's not in issue. If the Government wants to grant my clients immunity, as they are entitled to do, from Federal criminal prosecution, I'm sure they'd be glad to turn the records over.

However, I think it has been clear — Mr. Groves stated that he turned the case over when he suspected criminal fraud. Mr. Jennings testified that his job in the Internal Revenue Service is to investigate the criminal fraud, and they suspected criminal fraud. The Internal Revenue Service Bulletin 949 outlines the procedure for a Special Agent when he suspects criminal fraud, that he must give a *Miranda* type warning. Why give a warning if the person is not compelled to incriminate himself, if you had no criminal proceedings?

I think it's clear from Mr. Shaffer's testimony that every record involved, all the records, were solely

and exclusively the property of Mrs. Couch. There weren't any

page [42] work papers. None of these records were Mr. Shaffer's.

Certainly there are numerous cases on the point that a person's personal records are just as entitled to protection under the Fifth Amendment as is their verbal testimony. Certainly if that were not the case, the Fifth Amendment would have no meaning at all. To me—Well, the *Frank J. Sullivan* case, a 1923 case, makes the point that your records are as entitled to protection from self-incrimination as your testimony.

Certainly after the focal point of the investigation by the Justice Department and Internal Revenue Service, after it has shifted to a criminal investigation, after it has reached that point in our adversary system, certainly the taxpayer is entitled to the privileges extended by the Fourth and Fifth Amendments to the Constitution. If that weren't the case, then we would be extending to bank robbers and murderers and rapists greater protection than we extend to a person who is being investigated for violating the Internal Revenue Laws, and that would certainly be an anomaly, which I don't think Congress intended, and I think to the extent that Congress so intended, it violates the Fourth and Fifth Amendments to the Constitution.

THE COURT: As the Court has previously indicated, the Court feels that Mr. Shaffer was more or less a stakeholder of the papers, as an accountant for the taxpayer,

page [43] Mrs. Couch.

I can conceive of the fact that he was thrown

in the dilemma of the Government wanting to see the papers in his hands, and the lady, whose papers they were, wanting them returned to her or her attorney. I feel that the appropriate thing for Mr. Shaffer to have done on receipt of that notice was to ask the guidance of the Court before doing anything to the papers. Nevertheless, we must look, with some tolerance, to the fact that he returned the papers to the source from which they came, and I don't see that he has any antagonistic views toward the Government's investigation, and so I will permit him to be dismissed.

Now, as to Mrs. Couch, it has always been my understanding that every taxpayer of this country, not just one, but everyone, is required to keep them for three years. The purpose of keeping those records is for the Government to have the right to come there and to look them over; yours, his, mine, theirs, everyone's. The mere fact that a Special Agent is brought in on the case, certainly doesn't change it to the point of permitting the taxpayer to say, "Well, I'll just keep my documents. He can't tell what I've made. The Government can go searching, but they're not going to find out anything from me." That isn't the basis of the tax law.

It is a requirement that every taxpayer shall

page [44] keep accurate records. I do not mean by that, pinpointing penny and dime stuff, but substantially accurate records showing what their income has been, gross income and net income. If we didn't have that requirement, how could you enforce any tax law?

As I say, the fact that the Special Agent of the Intelligence Division was brought in, doesn't necessarily mean that the taxpayer is going to be indicted. Many, many cases are doubtless handled by the Intelligence Di-

vision assisting the Audit Division, in which indictments are never made.

As a matter of fact, it would have to go through a recommendation to the Justice Department and to the United States Attorney before being presented to a grand jury. So, I cannot see that we are violating the basic, fundamental, constitutional rights of any taxpayer to require them to produce their records. If that does violate them, then you may as well wipe off the requirement of tax investigation and place it on everybody's honor to do what they think is right and fair by the Government in the preparation of their tax returns.

It may be true that the primary function of the Intelligence Division is to investigate, looking primarily for fraud, but fraud may be of the civil type; it may be of the criminal type, and it would seem to me that if a taxpayer

page [45] has nothing to hide, that they would want to bring their papers out in the view of the cross examiner's eyes and to lay them on the desk, and as the old saying is, "put the cards on the table," and let's see.

She may have a proper explanation of what Mr. Groves referred to as "apparently an underestimate or statement of gross income." She may have a sufficient reason for it. Even after the indictment, if there was one made, and that has got to come in here in this courtroom and be returned by twelve good men and women and by the Court, whether there is any violation of the—criminal violation of the tax laws.

So, my feeling is, and my order is, that Mrs. Couch within ten days from this time, (If that isn't sufficient—or twenty days—I'll make it twenty days, be-

cause if you wish to appeal from the order, it will give you time to do it.) shall produce for the inspection of the Internal Revenue Service, her records that relate to her income taxes. I don't know what years, but I take it for the last two or three.

MR. ZIMMERMAN: 1964 through 1968, Your Honor.

THE COURT: 1964—

MR. DOWD: Through 1968, Your Honor.

THE COURT: —through 1968. Well, now, let me ask you; 1964 is beyond, unless there was an ex tension of time—Unless there is an extension of time, 1964 would be

page [46] going back too far. Was there a waiver or an extension of time granted?

MR. DOWD: Well, Your Honor, 1964 would only be considered as it may bear on—for background information, as it may bear on '66, '67 and '68, which I believe are the prime years they are concerned with.

THE COURT: Well, I didn't know that the taxpayer was required to keep records except for three years, but I realize that the Government has a right on fraud to go back further than that.

MR. DOWD: Yes, sir.

THE COURT: But if she only had records for three years, would there be any criticism?

MR. DOWD: No, Your Honor. We couldn't do anything about it.

Your Honor, if I could ask you, as part of your order; as I understood Mr. Shaffer would be willing to testify. I know you are going to dismiss him, but is that agreeable, because we'd like him ordered to testify with regard to these matters.

THE COURT: Well, that's another proceeding. You summon him in, and if he doesn't, then we will consider that.

MR. DOWD: Well, we have, Your Honor. It is part of this summons.

page [47] THE COURT: It is part of this summons?

MR. DOWD: Yes, Your Honor. We asked him—

THE COURT: Is he willing, Mr. Street?

MR. STREET: Yes, Your Honor, he's willing to testify.

THE COURT: That's all right.

MR. DOWD: Thank you, Your Honor.

THE COURT: Anything else, Mr. Rocovich?

MR. ROCOVICH: Well, Your Honor, I was going to oppose the order going into back years. The Statute of Limitations has run on those. It doesn't seem to me to be justified, but—

MR. DOWD: The Statute of Limitations is no bar, Your Honor, when they are checking fraud.

THE COURT: I understand it isn't. But the requirement for the taxpayer to keep those records is effective here.

MR. DOWD: Yes, Your Honor, if the taxpayer does not have the records—

THE COURT: Well, all I can do is require her to produce the records for '66, '67 and '68, as I see it. Now, if she has the other records—As you say, fraud investigations can go back even more than three years. If she doesn't have them, I can't require her—

MR. DOWD: No.

page [48] THE COURT: —to produce something she doesn't have.

MR. DOWD: Yes, Your Honor. If you could just require her to have the records that she does have for those years, it would be perfectly satisfactory with us.

THE COURT: All right. You prepare the order this afternoon, and I'll sign it.

You wish to take a prompt appeal?

MR. ROCOVICH: Yes, Your Honor, I'll take a prompt appeal.

THE COURT: All right. Well, recite in the order, Mr. Dowd, that Mr. Rocovich indicated his desire and has noted an appeal, and I take it that we should extend the time more than twenty days.

MR. DOWD: Well, we'll agree to thirty days.

THE COURT: All right. If that isn't sufficient, we can change it and modify it.

Here are the papers.

All right, Court is adjourned for the day.

(Thereupon Court was adjourned for the day.)

REPORTER'S CERTIFICATE

I, Barbara Jane Floyd, hereby certify that I am a duly appointed official court reporter for the United States District Court for the Western District of Virginia.

I hereby further certify that I was present in the United States District Court for the Western District of Virginia, Roanoke Division, Roanoke, Virginia, on February 2, 1970, and in the regular course of my duties reported the proceedings held in the case of United States of America and Edward F. Jennings, Special Agent, versus Harold L. Shaffer and Lillian V. Couch, Civil Action Number 70-C-3-R.

I further certify that the foregoing is a true and correct transcript of the proceedings held in the above case on the above date.

Barbara Jane Floyd
Barbara Jane Floyd
Official Court Reporter
United States District Court
Western District of Virginia

Given under my hand this the 11th day of March 1970.

Form 2039
(Rev. Nov. 1964)

U. S. Treasury Depaartment—
Internal Revenue Service

SUMMONS

In the matter of the tax liability of
Lillian C. Aleshire, a/k/a Lillian V. Couch
3102 Williamson Rd.
Roanoke, Va.

Internal Revenue District of Richmond
Period(s) 1964-1968 inclusive

THE COMMISSIONER OF INTERNAL REVENUE

To: Harold L. Shaffer
2233 Cantle Lane, S.W.
At: Roanoke, Virginia

GREETINGS:

You are hereby summonsed and required to appear before E. F. Jennings, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.

Place and time for appearance:

At your office, 1524 Peters Creek Road, N.W., Roanoke, Va., on the 2nd day of September, 1969 at 9:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 18th day of August, 1969.

ORIGINAL

Signature: E. F. Jennings
Title: Special Agent

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I hereby certify that I served the summons on the reverse hereof

Date Summons Served *(Day, month, year)* Time
8-18-69 8:47 a.m.

How Summons Was Served *(Check one)*

☐ I handed an attested copy thereof to the person to whom it was directed,

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

Signature E. F. Jennings Title Special Agent

COPY BOUND CLOSE IN GENTE

Supreme Court of the United States

No. 71-889 ~~October Term, 19~~

Lillian V. Couch,

petitioner,

v.

United States and Edward F. Jennings, etc.

ORDER ALLOWING CERTIORARI. Filed April 3 , 1

The petition herein for a writ of certiorari to the United States Co

Appeals for the Fourth ---------- Circuit is granted.

FILE COPY

FILED
APR 4 1972

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED
JANUARY 10, 1972
CERTIORARI GRANTED APRIL 3, 1972

MARTIN, HOPKINS AND LEMON
Counsel for Petitioner
Sixth Floor, Boxley Building
Roanoke, Virginia

CLAUDE D. CARTER
JOHN G. ROCOVICH, JR.
GERALD A. DECHOW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

BRIEF ON THE MERITS FOR PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the 4th Circuit is set forth at page A-3 of the Single Appendix. The opinion of the District Court for the Western District of Virginia is set forth at page A-6.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254. The petition for certiorari was filed within the ninety day period fixed by law from the judgment of the Circuit Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

[Amendment IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers, or other data.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry:

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may

deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

QUESTIONS PRESENTED

1. Whether a taxpayer by invoking his 5th amendment privilege against self-incrimination and his 4th Amendment privilege of freedom from unreasonable searches and seizures may prevent the enforcement of an Internal Revenue Service ("IRS") summons requiring taxpayer's tax consultant to produce the personal records of the taxpayer where the records were in the naked possession of the consultant when the summons was served on him but where the taxpayer had directed him to deliver the records to the taxpayer's attorney

before the issuance of the summons. (R6, 32) The question of whether the tax consultant would be required to deliver his own records or his worksheets prepared from the taxpayer's records is not in issue.

2. Whether the use of a manifestly civil statute to subpoena records is permissible in a tax case in which criminal fraud has become the dominant aim of the investigation being conducted by the government.

STATEMENT OF THE CASE

During the summer of 1969, Dennis L. Groves, ("Revenue Agent") an Internal Revenue Agent, commenced an investigation of the income tax returns of Mrs. Lillian V. Aleshire Couch (hereinafter referred to as "Taxpayer" or "Petitioner") for the years 1964 through 1968. He enlisted the assistance of Harold L. Shaffer, ("bookkeeper") a tax consultant, and long time employee of Mrs. Couch. Bookkeeper possessed certain work papers and cancelled checks prepared by Taxpayer in her own handwriting which she had delivered to him in order for him to prepare her tax returns. Bookkeeper had not transferred any of the information contained in Taxpayer's records to his own work sheets. During the course of his examination, Revenue Agent determined that there was potential criminal fraud involved in the case and requested the assignment of a Special Agent to aid in the investigation.

Mr. Edward F. Jennings, ("Special Agent") a Special Agent with the Intelligence Division of the Internal Revenue Service, was assigned to the case. Special Agent observed the results of Revenue Agent's investigation and Taxpayer's records, and then proceeded

to Taxpayer's residence with Revenue Agent, where he introduced himself, showed his credentials, and advised Taxpayer of her 5th Amendment rights and of her right to have an attorney present during the questioning.

Special Agent, on August 18, 1969, proceeded to Bookkeeper's office to either take or photo copy Taxpayer's records. In the meantime, Taxpayer had directed Bookkeeper, her tax consultant, to turn the records belonging to her over to no one but her attorney. (R32) Upon Bookkeeper's refusal to deliver the records, Special Agent issued a summons directing Bookkeeper to produce the records at 9:30 A. M. on September 2, 1969.

When Special Agent arrived at 10:10 A. M. on September 2, 1969 at Bookkeeper's office, he found that Bookkeeper had already turned the records in question over to Taxpayer's attorney, John G. Rocovich, Jr.

On January 7, 1970, the United States of America instituted proceedings to judicially enforce the summons. This appeal arises from an order of the United States Court of Appeals for the Fourth Circuit affirming an order of the U. S. District Court for the Western District of Virginia directing John G. Rocovich, Jr., Attorney, to produce the books and records in question.

SUMMARY OF ARGUMENT

The probe of Petitioner by the IRS was essentially a criminal one; thus, she is entitled to the protection of the 4th and 5th Amendments. The procedures adopted by the IRS as to giving the Petitioner a *Miranda* warning with the entry of a Special Agent into the case lead to the conclusion that at that point the IRS considered

the case a criminal one by its own definition. Once having established rules and regulations which import a color of criminality to a case the IRS is bound by the dictates of due process to abide by that definition. In any event, the unique circumstances of this particular investigation demonstrate that the main interest of the IRS in obtaining the Petitioner's records was to pursue a criminal prosecution.

The 5th Amendment to the U. S. Constitution grants the Petitioner the right to be free from being compelled to incriminate herself in any manner. The private records of a taxpayer fall within the scope of that privilege and are immune from process whether in the taxpayer's personal possession or in the possession of an employee of the taxpayer retained to prepare income tax returns. The 4th Amendment prevents the IRS from abusing process to reach documents protected from disclosure by the 5th Amendment.

In the case at bar the IRS has utilized a civil statute to pursue a criminal probe. As the civil law does not adequately afford the Petitioner the opportunity to assert her constitutional rights as would the criminal law, the statute has been misused and, hence, the summons sought to be utilized to ferret out evidence is inappropriate for the purpose and unavailable. The summons should, therefore, be quashed. If the IRS is permitted to usurp the rights of a taxpayer when he delivers his private records to an expert to formulate data into a tax return, then the 5th Amendment will become an empty promise. The complexity of the tax law requires individuals to seek advice; to strip a citizen of his rights by reason of the heavy burden placed on him by the gov-

ernment is exactly the result prohibited by the 5th Amendment.

ARGUMENT

I.

The investigation by the Internal Revenue Service into the affairs of petitioner was an essentially criminal one at the time the IRS summons issued seeking production of petitioner's records.

A.

Although the IRS has consistently argued that the case at bar presents only the possibility of a criminal charge while retaining a predominately civil character, your petitioner points to the fact that certain procedures adopted by the IRS require that the investigation be considered a criminal one. In "IRS News Release No. 949" of November 26, 1968, the IRS advised the public as follows:

> "Changes in the procedure for advising taxpayers of their rights during an investigation conducted by a Special Agent of the IRS Intelligence Division were announced today by the Internal Revenue Service.
>
> The new procedure goes beyond most legal requirements that are designed to advise persons of their rights.
>
> One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that

anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding. Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary state.

IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before an interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U. S. Comissioner."

The testimony of Special Agent (R 25, 26) discloses that the petitioner was given the same basic warning as contained in the news release. The petitioner contends that by the definition established by the IRS the investigation became a criminal probe. Even if the IRS definition of a criminal proceeding is much more liberal in scope than the trend of modern legal theory, your petitioner contends that once having established a substantive rule the IRS is bound to it by the dictates of due process. The *Miranda* type warning required by the news release

on a Special Agent's contact with a taxpayer would be totally devoid of meaning if the IRS were permitted to circumvent it by claiming that its investigation is wholly civil and that it may proceed exactly as it chooses as if the warning had never been given.

The IRS must scrupulously observe the rules, regulations, and procedures it has established or the courts will strike them down, *U. S.* v. *Heffner,* 420 F2d 809 70-1 USTC 9152 (1970) following *United States ex rel Accardi* v. *Shaughnessy* 347 U. S. 260 ('954). While your petitioner does not deny that the IRS did follow its preliminary procedures in the case at bar, she challenges the IRS claim that it is not bound to the definition and impact that necessarily devolve from the utilization of those particular procedures. The IRS claims by virtue of its actions, that the delivery of a *Miranda* warning does not make the probe a criminal one and that it is still free to operate as if the case were wholly civil. If that interpretation of the impact of the IRS warning procedure is correct then the warning is totally devoid of meaning and its delivery only an exercise in futility. The petitioner contends that the delivery of a *Miranda* warning to her emphasizes that the IRS has overtly stated by definition that the criminal aspects of its inquiry outweigh the civil ramnifications. The IRS having elected to pursue a criminal probe should not later be permitted to conveniently claim the investigation is only civil in order to circumvent the very rights outlined to petitioner in the warning to her. When the warning has been administered the petitioner is immediately clothed with the full protection of the 5th Amendment, whether or not under other circumstances an investigation would be considered criminal at that point, and as the warning states, "the taxpayer

... cannot be compelled to incriminate himself ... by producing any documents".

B

In the case at bar, the finger of accusation had already turned toward the petitioner before the Special Agent appeared. The obvious goal of the subsequent investigation by the Special Agent was to discover further evidence to substantiate the investigating Agent's belief of the existence of criminal fraud (R 19, 20). The Petitioner maintains that at the time the IRS issued the summons to the bookkeeper, its main purpose was the conduct of a criminal investigation. The finger of accusation turned toward the Petitioner when the investigating agent proceeded past the point in his investigation when he suspected fraud in order to substantiate his suspicions as he testified that he did for three days (R 10, 20). Once the suspicions of the investigating agent were substantiated, he then referred the case to a Special Agent to confirm his analysis. In the circumstances of the case at bar it is apparent that the probe had become a criminal one before the entry of the Special Agent. When the probe became manifestly criminal in nature, the 5th Amendment was the petitioner's shield from self-incrimination and the IRS may not avoid it by trying an end run around her defenses by claiming it was conducting a simple, good faith civil investigation. Of course, the petitioner continues to assert her willingness to produce documents if the IRS will give its assurance that the case is purely civil and forego a criminal thrust.

II.

The 5th Amendment to the United States Constitution protects a citizen from producing evidence to incrim-

inate himself. The 4th Amendment to the United States Constitution prevents the government from abusing process so as to conduct an illegal search or seizure to gain testimony or evidence protected by the right of a citizen to be free of self-incrimination. In this sense the two amendments virtually run into one another.

A.

The petitioner alleges that the IRS is attempting to narrowly define the perimeter of her rights under the 4th and 5th Amendments to the United States Constitution. She contends that a taxpayer's private records are the written testimony of the taxpayer and the government may not obtain that testimony without the taxpayer's consent in aid of an investigation which has become criminal in nature. For a number of years Petitioner has had her tax returns prepared by Shaffer (Bookkeeper). In order to facilitate the task, she delivered her personal books of account, cancelled checks, and daily register to his office. All of these documents were written in petitioner's own longhand and had been personally prepared by her. Bookkeeper utilized the data directly and did not prepare any work-sheets of his own. He did not own any of the materials and always held and stored them subject to petitioner's right of ownership. The IRS contends that the petitioner cannot assert her 4th and 5th Amndment rights to prevent it from obaining production of the records as the documents were not in her possession. If the records sought were in the possession of taxpayer it is clear that those records would be immune from process as falling within the ambit of the 5th Amendment. The landmark case of *Boyd* v. *U. S.* 116 US 616 (1886) reasoned that the personal records of an individual are the testimony of that individual and are

protected by his right to befree from self-incrimination. The IRS seeks to destroy that privilege the instant ownership and possession separate. In a complex, modern society the Petitioner contends that destruction of the privilege under those circumstances would strip the meaning from the 5th Amendment.

The Petitioner believes that the 5th Amendment prevents the IRS from obtaining her testimony, her records in order to force her to incriminate herself. If the IRS is able to reach her records the instant those records leave her hands and are deposited in the hands of her retainer whom she has hired for a special purpose then the meaning of the privilege is lost. The records though in the hands of a retainer are still the testimony of the petitioner. The retainer canneither add nor subtract from the value of the documents. He is using them only by the direction of the taxpayer for a specific purpose without altering them one iota. The ultimate goal of the IRS remains a quest for the testimony of the petitioner herself. It would be naive to think that somehow the character of the testimony had changed by the mere transfer of petitioner's records from her hands to those of a hired factor. The prohibition stated in *Boyd* v. *U. S.* (*supra*) remains and as was said there at 861, "any forcible and compulsory extortion of a man's own testimony or his private papers to be used a evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other." The Court does not there premise its decision on the physical location of private papers; the ban prohbiting their use against their owner is total. The courts have frequently prevented the use of a man's own papers gainst him in a series of cases

since *Boyd* v. *U. S.* (*supra*), although in most of these instances possession and ownership have remained simultaneous, for example, *U. S.* v. *Cohen* 388 F2d 464, 68-1 USTC 9140 (CA9 1967), *U. S.* v. *Judson* 63-2 USTC 9658 (CA9 1963) *Hill* v. *Philpott* 445 F2d 144 71-1 USTC 9415 (CA7 1971). In *Stuart* v. *U. S.* 416 F2d 459 69-2 USTC 9630 (CA5 1969) the Court prohibited the IRS from reaching the private records of a taxpayer when in the hands of his accountant. The records had been delivered earlier to the accountant for the government's case in examining them. The court in essence held that the private records of the taxpayer remain surrounded by his privilege in spite of the fact that the records are not in his possession.

The right of a taxpayer to intervene and object to a summons directed to his accountant seeking the private records of the taxpayer was reviewed in *U. S.* v. *Graf* 371 F2d 67 (CA6 1967). There the court permitted the IRS to obtain the records but only in its assurance that no criminal action would ever result. The opinion infers a different result would obtain if a criminal prosecution were in the wings as in the case at bar.

In the instance litigated thus far, courts have been prone to protect the records of an individual from forced production for use against the owner when the documents happen to be in the possession of another. In *U. S.* v. *Guterma* 272 F2d 344 (CA2 1959), Guterma, the taxpayer, kept his personal records in a safe on Jacobs' premises. The IRS directed a summons to Jacobs ordering him to deliver up the records in his possession. Guterma intervened and asserted his 4th and 5th Amendment rights. The court appropriately cut through the facade of mere possession and held that ultimately Guterma

himself was the object of the summons. The constitutional intent to throw a protective screen around the individual is the fundamental factor. See also *U. S. and Weaver* v. *Kleckner* 273 F. Supp. 251, 67-2 USTC 9536 (1967).

The basic legal privilege emerges that the owner, the individual to whom the summons is ultimately directed, can quash a summons which has been served on another party who is a naked possessor of the first party's own records. The dilemma in such a situation can easily be resolved by asking "If the papers were in the hands of their owner would they be privileged?" If the answer to the question is "yes" then the government should not be allowed to circumvent the rights of the owner for the sole reason that ownership and possession do not happen to coincide in one individual at the time the summons is served. The petitioner concedes that the IRS can reach records belonging to another though in the hands of a taxpayer under investigation, in certain circumstances. *Deck* v. *U. S.* 339 F2d 739 (1964).

The basic principle that a subpoena should be directed to the owner rather than a naked possessor has also been recognized in *Schwimmer* v. *U. S.* 232 F2d 855 (CA8, 1956). Attorney Schwimmer had closed his law offices and stored his files together with those of his clients at the Dean Rubber Manufacturing Company. In the course of an investigation into alleged bribery and tax matters, the government directed a subpoena to Dean requiring that it deliver up all of the records in its possession. Schwimmer thereupon intervened asserting his right of freedom from self-incrimination. The Court decided that the subpoena was ultimately directed to Schwimmer himself although it was technically served on

Dean. Schwimmer, therefore, had a right to intervene and was able to successfully assert his 4th amendment rights. The Court looked to the rights of the owner and did not become confused by the happenstance of mere possession saying, at 861, "Schwimmer legally had such possession, control, and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third party naked possessor to produce and deliver them." The case at bar does not materially differ from Schwimmer. In each the actual owner of the document should not be deprived of substantial rights when he has entrusted the records to another without transferring ownership.

Petitioner has never transferred ownership of the records to bookkeeper, and bookkeeper's behavior and testimony (R 9, 10) disclose that he never considered he was anything more than a mere possessor. He used the records to construct tax returns but never gained any incidents of ownership. The IRS contends that if questioned about the returns he would have had to utilize the documents but that is irrelevant. The documents were susceptible at any time of being taken from him, as they in fact were, which would leave him with nothing but what he could reconstruct from memory. The bookkeeper was a naked possessor and in essence his situation does not differ from those of the possessors in *Guterma* (supra) or *Schwimmer* (supra). Nor should the fact that he observed the records be relevant as he never touched them so as to change their character or their ownership. The records were always those of petitioner.

C.

The reliance of the government on *Donaldson* v. *United States* 400 U. S. 517 (1971) is clearly misplaced. At 522-523, Mr. Justice Blackman sets forth a fact situation identical to the case now at bar and states that the Court expressly excepted that situation from its decision. Your petitioner reiterates in the case at bar, her records in which she has a proprietary interest were in the hands of her retainer. In *Donaldson,* the IRS sought records of Acme prepared for Acme's use by Acme's accountant although relating to taxpayer, Mercurio, who attempted to prevent their production. Mercurio had not constructed the records nor did he own them, nor did he ever place them in another's hands.

The sections of the Internal Revenue Code under consideration are civil laws, not criminal ones.

A.

The IRS has used a civil statute to facilitate a patently criminal investigation and has misused the law. The civil law does not provide necessary safeguards present in the criminal law to protect the rights of the accused.

The Trial Court did not have jurisdiction as the use of Internal Revenue Code Section 7402 and Section 7406 in the case at bar was a manifestly criminal one while the intent of the Sections is to provide for actions manifestly civil in nature with only possible criminal overtones.

The case at bar had clearly progressed to the point where its criminal nature over-shadowed any actual civil

investigation; therefore, the summons issued under Sections 7402 and 7406 of the Internal Revenue Code of 1954 was misused as the statute is a civil one, not a criminal one. This Court in *Donaldson* v. *U. S.* et al 27 L Ed 2d 580, 400 US 517, 91 SCt 534 (1971) laid out certain guidelines for the use of the summons authorized by the above cited sections of the Internal Revenue Code which have not been adhered to in the case at bar. Conceding for the moment, that this case should be measured by the *Donaldson* yardstick, your petitioner alleges that the IRS did not act in "good faith" in issuing the summons and that the clear purpose of the summons was to obtain evidence for use in a criminal prosecution. If there was any motive for discovering the supposed civil liability of the petitioner its importance had been virtually reduced to a nullity at the point in time when the summons was issued. The Court in *Donaldson* (Supra) recognizes the validity of a summons issued under Sections 7604 and 7606 where the purposes of the summons are civil with only the possibility of a criminal prosecution if the summons is issued in "good faith" and prior to a recommendation for prosecution. The petitioner contends that the action of the government agent in his carrying investigation beyond the point where he was merely suspicious of fraud to the point where his suspicions were confirmed (R 19) flaunts the rule enunciated in *Donaldson* (Supra) and constitutes the use of the section for the substantially single purpose of obtaining evidence for a criminal prosecution. The technicalities of the IRS procedure as to calling in a special agent are generally not crucial for the purposes of determining when the case becomes criminal, but they can be important in the context of a particular case. The intelligence agent was called into the case at bar not to ascertain the existence

of tax fraud but to substantiate the alleged fraud which the first agent had already ascertained. The petitioner contends that the Court should examine the totality of circumstances surrounding the case in order to determine whether or not the statute has been correctly utilized for its intended purpose and in accord with constitutional guarantees. It would be a trespass on the law to permit the government to maintain a civil disguise for its investigation when its agents have already determined that they are chiefly interested in criminal fraud in order for the government to utilize the readily available power of a mainly civil statute to ferret out evidence sought for a criminal prosecution.

In the case at bar, the intelligence agent stated that his main purpose in this investigation was to substantiate evidence of tax fraud which the initial investigation by another agent had ascertained. (R 23) The Court must look at this in light of first agent's admission that he had gone beyond the pont of mere suspicion to the point of confirmed suspicion. (R 19) The aim of the investigation was criminal, not civil. The statute was, therefore, misapplied according to the guideline formulated for its proper use as set forth in *Donaldson.*

The Court in *Donaldson* carefully distinguished the facts of that case and noted it was not a case in which the records in the hands of the party at whom the summons was directed belonged to the taxpayer or in which the taxpayer had a proprietary interest. The line of cases from which *Donaldson* evolves all share a common fact situation: the government is attempting to have records belonging to X brought forward which are in X's possession but which relate to X's dealings with

Z, the taxpayer.[1] In none of the cases did the Court find that the taxpayer had established any ownership rights in the records.[2] The summons as applied to those situations, whether civil or criminal, extracts information only from the records or mouth of another party. Neither the records nor the mouth are those of the taxpayer. An exception would be those cases in which the person who has possession of the documents is the majority shareholder of the corporation which owns them or an officer of the organization which owns them. When, however, the situation is reversed and the records in the hands of X belong to taxpayer then the interpretation of the code section must surely alter. The IRS is not simply asking another to tell what he knows about his business with taxpayer. The government is asking the taxpayer to disclose his own dealings. The situation whether wholly accusatory or only partially accusatory must necessarily allow the taxpayer to protect his rights. The Constitution does not drop its shield in front of the taxpayer only when he is faced with the actual indictment. It also protects him during the preparatory and investigatory stages.[3] The protections contemplated by the 4th and 5th amendments would be of little value otherwise. As the statute applies to the case at bar, then, it has been misused and is void. The government may not be permitted to use it against the taxpayer himself or his personal records.

The case at bar is analogous to *Deck* v. *U. S.* 339F2d-739. (1964). There the government directed a summons

[1] *Reisman* v. *Caplin* 375US440, 11LEd 2d 459 (1964) at 466
Wild v. *United States*, 362 F 2d 206 at 209 (1966)
Venn v. *United States* 400F 2d 207 at 210 (1969)
[2] *U. S.* v. *Roundtree* (CA5, 420 F2d 485 1969)
[3] *Miranda* v. *Arizona* 384 US 436 (1966)
Escobedo v. *State of Illinois* 378 US 478 (1964)

to Deck, attorney for taxpayer Kless who was under investigation, seeking to have produced certain work papers allegedly belonging to Phillips, an accountant who had prepared tax returns for taxpayer Kless. Kless intervened in the action and claimed the papers belonged to him; however, the court ruled that the work papers belonged to the accountant. The Court considered the ownership of the papers important to the outcome of the case and concluded that as ownership was in Phillips that Deck would be compellable to produce them in spite of taxpayer Kless' assertion of privilege. The inference here though is that if the papers had belonged to Kless, but in Deck's hands, they would not have been reachable via a summons. Ownership of work papers produced by an accountant was subsequently held to be determinative of whether or not the papers were reachable via an IRS summons, when in the hands of the client-taxpayer.[4]

IV

The difficulty and time required to prepare data for use in tax returns has compelled taxpayers to retain specialists for that specific purpose. The increased complexity of government should not be used as an excuse whereby individuals are compelled to forfeit basic rights.

A.

The difficulties of preparing an individual tax return have been well documented in the last few years. Indeed, the IRS has itself recognized the problem by making an inordinately large number of its agents available during the early months of 1972 to aid taxpayers in the preparation of their returns. The rapid proliferation

[4] *United States* v. *Levy* 270 F Supp 601 at 603 (1967)

of tax preparation firms is testimony to the complexities of the return and reporting procedure required by the government. The brute size and maze work of the Internal Revenue Code provides the last measure of testimony as to the rigors of the tax system.

Having established such a disjointed, complex mass, which has compelled many taxpayers to seek outside aid, the IRS now desires to benefit from the conditions it has created by arguing that taxpayers forfeit substantive constitutional rights when their private papers are delivered to their hired experts. Your petitioner contends that such a forfeiture of rights under the 4th and 5th Amendments would virtually drain the amendments of meaning in a society whose bureaucracy is ever expanding and continually demanding that individuals make various reports touching on all aspects of life. The expertise required to report to the IRS is obviously beyond the capability of many individuals and the Petitioner alleges that the 4th and 5th Amendments were enacted to protect the individual from the terrible burden of an accusatorial government. To fulfill the mandate of those amendments the testimony, whether or not written, of an individual must continue to be privileged regardless of governmental pressure to usurp it for its own ends.

B.

If the written testimony of a taxpayer is not protected the Petitioner alleges that the IRS will be generally hindered in administering the revenue laws. As is now frequently the case, taxpayers permit their records to be examined at the offices of their accountants or attorneys, however, if to permit those documents to be removed from their immediate, personal possession will

work a forfeiture of substantive rights, your Petitioner contends that the motive for cooperation will be sharply limited. The taxpayer will be well advised to take his private records into his personal possession in order to be sure his 5th Amendment rights will be applicable in the event the question of impropriety is raised. In such circumstances, the convenience and orderliness of the IRS in administering the revenue laws and conducting audits would be severely hampered to the detriment of the government by the difficulty the IRS will encounter in obtaining the necessary cooperation of the individual taxpayer so essential in what is basically a "self-reporting" system.

CONCLUSION

For the reasons set forth above, your Petitioner prays that the enforcement of the summons be denied.

Respectfully submitted,

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John G. Rocovich, Jr.,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

LILLIAN V. COUCH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4–A6) is reported at 449 F. 2d 141. The district court's findings of fact and conclusions of law (Pet. App. A7–A13) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971. The petition for certiorari was filed on January 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a tax summons requiring that a taxpayer's records be produced by the taxpayer's book-

keeper who kept the records in his possession after using them to prepare tax returns violated the taxpayer's Fifth Amendment privilege against self-incrimination or her right to be free of unreasonable searches and seizures under the Fourth Amendment.

2. Whether a summons issued by a special agent of the Intelligence Division in the course of a joint investigation concerned with the possibility of tax fraud as well as criminal violations of the revenue laws is enforceable under *Donaldson* v. *United States*, 400 U.S. 517.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant provisions of the Constitution and the Internal Revenue Code of 1954 are set forth at Pet. App. A1–A3.

STATEMENT

The government brought this suit to enforce an Internal Revenue Service summons[1] requiring petitioner's bookkeeper to appear before a special agent of the Service to testify and to produce for examination various books, records, and papers utilized in preparing petitioner's income tax returns.[2] The district court ordered compliance with the summons (Pet.

[1] The summons was issued under Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.).

[2] The summons was entitled "In the matter of the tax liability of Lillian V. Aleshire a/k/a Lillian V. Couch" for "1964–1968 inclusive". It requested the bookkeeper, Harold E. Shaffer, to produce documents described in the summons as follows (R. 9): "All books, records, bank statements, cancelled checks, deposit tickets, * * * work papers, and all other documents pertaining to the tax liability of the above taxpayer." ("R." refers to the record appendix filed by petitioner in the court of appeals.)

App. A7–A13), and the court of appeals affirmed *per curiam* (Pet. App. A4–A6).

The summons was issued during a joint investigation by both the Audit and Intelligence Divisions of the Internal Revenue Service of petitioner's income tax returns for the years 1964 through 1968 (Pet. App. A11). Petitioner's bookkeeper (Mr. Shaffer) had previously permitted Internal Revenue Agent Groves to examine the records in question (R. 16, 27–28). Agent Groves reported that he suspected fraud, as a result of which Special Agent Jennings was assigned to assist with the joint investigation (R. 28–31, 34–35). Special Agent Jennings was chiefly concerned with the possibility of income tax fraud (R. 36), while Agent Groves, who continued his investigation (R. 29), focused on determining the correct tax for civil purposes (R. 41).

On August 18, 1969, Mr. Shaffer refused to allow Special Agent Jennings to examine the records, and Jennings issued the summons here involved (Pet. App. A8; R. 44–45). On September 2, 1969, the date set in the summons for delivering the records, Shaffer instead gave them to petitioner's attorney (John G. Rocovich, Jr.), at petitioner's direction, and Mr. Rocovich has had them ever since (Pet. A9–A10; R. 22–23). This kept Shaffer from complying with the summons, and resulted in the government's seeking judicial enforcement in this proceeding.

Petitioner intervened in the district court and asserted that enforcement of the summons would violate her Fourth and Fifth Amendment rights (Pet. App. A10). The court noted that petitioner had given the

records involved to Mr. Shaffer for use in preparing petitioner's income tax returns,[3] and that Mr. Shaffer had retained the records until he turned them over to petitioner's attorney on September 2 (Pet. App. A9). It concluded that the summons was issued "pursuant to a legitimate purpose" in connection with the joint investigation, and accordingly ordered that the records be produced (Pet. App. A11–A13).[4] Petitioner's claims were rejected on the ground that the summons did not involve any material in petitioner's possession (Pet. App. A12).

Only petitioner appealed, and the court of appeals affirmed (Pet. App. A4–A6). It held that the summons was proper since the investigation included "a legitimate civil purpose," and that the Fifth Amendment privilege did not apply since "the records were not in the intervenor's [petitioner's] possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records" (Pet. App. A5–A6).

ARGUMENT

There is no conflict of decisions or other reason warranting further review.

1. Petitioner's principal contention (Pet. 5–13) is that she would be compelled to testify against herself in violation of the Fifth Amendment privilege against self-incrimination if her bookkeeper is required to produce the records which she gave to him for use

[3] The information in petitioner's tax returns was taken directly from these records (R. 20, 24–25).

[4] Because the records were then actually held by Attorney Rocovich, the court's order is directed to him (Pet. App. A12–A13).

in preparing her federal income tax returns. But the district court's order is directed solely to the bookkeeper, and he is the only one compelled under it to do something.[5] "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States,* 228 U.S. 457, 458; cf. *Burdeau* v. *McDowell,* 256 U.S. 465, 467. Since petitioner has not been ordered to produce documents or to testify, the privilege against self-incrimination does not apply.

2. Petitioner also contends (Pet. 5–13) that production of the records would be an unreasonable search and seizure in violation of the Fourth Amendment. In the circumstances here, however, there is no violation.

The reliance on *Boyd* v. *United States,* 116 U.S. 616, is misplaced. In that case, unlike the present one, the production order was issued in the context of an essentially criminal proceeding and was directed against the owner of the property, who by responding would have had to authenticate the evidence that he claimed was incriminating, in violation of the Fifth Amendment. Nor is this a case like *Schwimmer* v. *United States,* 232 F. 2d 855 (C.A. 8), or *United States* v. *Guterma,* 272 F. 2d 344 (C.A. 2), where the owner put his records in storage or in a safe and retained

[5] Though the order to produce the records was directed to petitioner's attorney, Mr. Rocovich, this resulted from the fact that the bookkeeper, *after* the summons was served upon him, ignored it and instead turned the records over to the attorney. The parties' rights or obligations were fixed when the summons was served, and the transfer did not alter them. See *United States* v. *Zakutansky,* 401 F. 2d 68, 72 (C.A. 7), certiorari denied, 393 U.S. 1021; *United States* v. *Lyons,* 442 F. 2d 1144 (C.A. 1).

constructive possession of them. Here, petitioner gave the records to her bookkeeper with the understanding that he would use the information contained therein in income tax returns, and would have to certify under penalties of perjury that the returns were correct to the best of his knowledge. See Sec. 6065, Internal Revenue Code of 1954 (26 U.S.C.); Treasury Regulations on Income Tax (1954 Code), § 1.6065–1 (26 C.F.R.). He retained the records after completing the returns. And he made no independent work papers of his own, so that if questioned about his work product he would have had to use the records.

In this context petitioner is not correct in characterizing the bookkeeper as a mere "naked possessor" (Pet. 11), nor does enforcement of the summons violate the Fourth Amendment. See *Falsone* v. *United States,* 205 F. 2d 734, 739 (C.A. 5), certiorari denied, 346 U.S. 864; cf. *United States* v. *Wallace Co.,* 336 U.S. 793, 796–797; *Hinchcliff* v. *Clarke,* 371 F. 2d 697, 700–701 (C.A. 6); *DeMasters* v. *Arend,* 313 F. 2d 79, 85 (C.A. 9), petition for a writ of certiorari dismissed, 375 U.S. 936.[6] It has not been held by this Court, nor to our knowledge by any other, that a summons or

[6] In the *Hinchcliff case*, which petitioner cites (Pet. 7) as *United States* v. *Graf*, the government assured the court of appeals (371 F. 2d at 701) that there would be no criminal prosecution in any event. In this respect, of course, the case was different from the present one. *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4), which petitioner also cites (Pet. 8), is inapposite to the issue here. That case held that evidence obtained by a special agent who had not given warnings of constitutional rights as required by Internal Revenue Service regulations must be suppressed. Nothing the agents did in this case violated any agency rule.

subpoena directed at a third party who possesses papers for a proper use raises Fourth Amendment rights on behalf of a person who claims some kind of ultimate ownership of the papers. Moreover, even if in the context of a simple criminal case such an owner might have a Fourth Amendment claim, the Amendment clearly does not apply to a summons issued in a civil proceeding. The essential purpose of the summons here is to help ascertain petitioner's civil tax liability. Further, it is inappropriate to test petitioner's Fourth Amendment claim in this civil suit.

3. The court of appeals correctly concluded that, contrary to petitioner's contentions (Pet. 14–18), the summons was enforceable under the test of *Donaldson* v. *United States*, 400 U.S. 517, since the investigation in question had "a legitimate civil purpose" (Pet. App. A5). The claim that the Revenue agents "are chiefly interested in criminal fraud" (Pet. 16) is refuted by the district court's finding (Pet. App. A11), sustained by the court of appeals (Pet. App. A6), that there was "a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud * * *." As the Court admonished in *Donaldson* (400 U.S. at 535), "the special agent may well conduct his investigation jointly with an agent from the Audit Division," and "their combined efforts are directed to both civil and criminal infractions." Noting that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (*ibid.*), the Court refused to deny enforcement solely because a

special agent had entered the case (400 U.S. at 535-536):

> To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1972.

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Supreme Court, U.S.
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JUN 10 1972
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IN THE

Supreme Court of the United States

1972

UNITED STATES OF AMERICA
and
EDWARD F. JENNINGS
Special Agent,
Petitioner
Appellee

v.

LILLIAN V. COUCH
Intervenor Respondent
Appellant

Petition for writ of certiorari to the United States Circuit Court of Appeals for the 4th Circuit

---

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the 4th Circuit is set forth at page A-4. The opinion of the District Court for the Western District of Virginia is set forth at page A-7.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED

1. Whether a taxpayer by invoking his 5th amendment privilege against self-incrimination and his 4th Amendment privilege of freedom from unreasonable searches and seizures may prevent the enforcement of an Internal Revenue Service ("IRS") summons requiring taxpayer's tax consultant to produce the personal records of the taxpayer where the records were in the naked possession of the consultant when the summons was served on him but where the taxpayer had directed him to deliver the records to the taxpayer's attorney before the issuance of the summons. (Tr 6, 32) The question of whether the tax consultant would be required to deliver his own records or his worksheets prepared from the taxpayer's records is not in issue.

2. Whether the use of a manifestly civil statute to subpoena records is permissible in a tax case in which criminal fraud has become the dominant aim of the investigation being conducted by the government.

STATEMENT OF FACTS

During the summer of 1969, Dennis L. Groves, ("Revenue Agent") an Internal Revenue Agent, commenced an investigation of the income tax returns of Mrs. Lillian V. Aleshire Couch (hereinafter referred to as "Taxpayer" or "Petitioner") for the years 1964 through 1968. He enlisted the assistance of Harold L. Shaffer, ("bookkeeper") a tax consultant, and long time employee of Mrs. Couch. Bookkeeper possessed certain work papers and cancelled checks prepared by Taxpayer in her own handwriting which she had delivered

to him in order for him to prepare her tax returns. Bookkeeper had not transferred any of the information contained in Taxpayer's records to his own work sheets. During the course of his examination, Revenue Agent determined that there was potential criminal fraud involved in the case and requested the assignment of a Special Agent to aid in the investigation.

Mr. Edward F. Jennings, ("Special Agent") a Special Agent with the Intelligence Division of the Internal Revenue Service, was assigned to the case. Special Agent observed the results of Revenue Agent's investigation and Taxpayer's records, and then proceeded to Taxpayer's residence with Revenue Agent, where he introduced himself, showed his credentials, and advised Taxpayer of her 5th Amendment rights and of her right to have an attorney present during the questioning.

Special Agent, on August 18, 1969, proceeded to Bookkeeper's office to either take or photo copy Taxpayer's records. In the meantime, Taxpayer had directed Bookkeeper her tax consultant, to turn the records belonging to her over to no one but her attorney. (Tr 32) Upon Bookkeeper's refusal to deliver the records, Special Agent issued a summons directing Bookkeeper to produce the records at 9:30 A. M. on September 2, 1969.

When Special Agent arrived at 10:10 A. M. on September 2, 1969 at Bookkeeper's office, he found that Bookkeeper had already turned the records in question over to Taxpayer's attorney, John G. Rocovich, Jr.

On January 7, 1970, the United States of America instituted proceedings to judicially enforce the sum-

mons. This appeal arises from an order of the Circuit Court affirming an order of the District Court directing John G. Rocovich, Jr., Attorney, to produce the books and records in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions relevant to this case are the Fourth and Fifth Amendments to the United States Constitution. Federal statutes under consideration are Sections 7604 and 7606 of the Internal Revenue Code of 1954 as amended. The above amendments and statutes are set forth in relevant part in the appendix to this brief.

SUMMARY OF ARGUMENT

I. An Internal Revenue Service summons which seeks to reach the private records of a taxpayer for possible use against the taxpayer constitutes a violation of taxpayer's right to remain silent and her right to be free from unreasonable searches and seizures.

The invasion of privacy, created by a thrust for taxpayer's private records when the records are in the naked possession of taxpayer's employee discourages free communication and has a chilling effect on the conduct of the taxpayer's business affairs.

Where the taxpayer retains ownership and control of his records but where the records are in possession of taxpayer's employee, the taxpayer's privilege to prevent disclosure of the records is retained.

The Internal Revenue Service will have a more difficult task in enforcing the revenue laws if the privilege surrounding the records of a taxpayer is lost as soon as mere possession passes to taxpayer's employee.

II. The Internal Revenue Code sections under review are predominately civil statutes, intended for use in civil cases.

The Internal Revenue now seeks to use the summons power of the Internal Revenue Code to discover evidence plainly intended for use in a criminal case. Such an application of the law is not permissible in the context of the case at bar.

ARGUMENT

1

A taxpayer's private records are the written testimony of the taxpayer and the government may not obtain that testimony without taxpayer's consent in aid of an investigation which has become criminal in nature.

Taxpayer contends that the government is attempting to narrowly define the perimeter of her rights under the 4th and 5th amendments to the United States Constitution. The effect of these restrictions will be deleterious to Petitioner's position and will adversely influence the administration of the internal revenue laws.

For a number of years Petitioner had her tax returns prepared by Mr. Shaffer, a bookkeeper retained for this purpose. In order to facilitate his task, she de-

livered her personal books of account, cancelled checks, and daily register to his office for his use. Bookkeeper utilized this information and transferred it directly to the returns without assembling any worksheets of his own. He did not own any of the materials and always held and stored them subject to petitioner's right of ownership. Bookkeeper is not a Certified Public Accountant, and your petitioner has not asserted a claim of a privileged relationship in this case.

The IRS has attempted to reach these personal records belonging to Taxpayer in the face of Taxpayer's assertion of her privilege of freedom from self-incrimination and her right to be free from unreasonable searches and seizures.

The IRS contends that no such rights are applicable because the records were not in the Petitioner's immediate personal possession and that the investigation is civil and carried with it only the possibility of a criminal prosecution.

The venerable and respected case of *Boyd* vs. *U. S.* 116 US 616 (1886) established that process could not issue to compel a taxpayer to produce his personal records in contravention of the taxpayer's assertion of his rights under the 4th and 5th amendments. The records of the taxpayer are, in essence, the testimony of the taxpayer himself. To force their production would be to compel the taxpayer to be a witness against himself. In the case at bar, the government contends that as the records were not in the immediate, personal possession of the taxpayer at the time of the issuance of the summons that the privilege is inapplicable.

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The petitioner says that that is a distinction without a difference. The crucial question before the Court is who is being asked to testify.

The petitioner contends it is she who is being asked to bring forward testimony for possible use by the government against her.[1] Bookkeeper certainly is not able to testify, since he has no records of his own, he merely has in his possession records belonging to the petitioner.. All that he could deliver to the IRS would be petitioner's very own records, without being able to add or subtract anything to or from their value. He would be a delivery man only, a mere conduit through which the government could reach the mouth of the taxpayer, a result prohibited by the 4th and 5th amendments and so enunciated in *Boyd* vs. *U. S.* (Supra).

The case most similar to the one at bar is *U. S.* vs. *Graf* (CA6, 371 F2d 697, 1967). There Graf, an accountant for taxpayer, was served with a summons requiring him to deliver to the IRS "all" of taxpayer's records in his possession. Included among these were numerous books of account belonging to the taxpayer. The taxpayer intervened and objected. On appeal the Circuit Court decided, on the representation of the IRS that no criminal charges would be filed as a result of the information so discovered, that the summons was enforceable. The Court made it explicit, however, that the basis for its decision lay in the absolute freedom of the taxpayer from possible criminal charges and that the *Boyd* doctrine would not be extended to a "purely" civil pro-

[1] The law is well established that if records owned by taxpayer are in taxpayer's immediate possession her privilege protects them from the probe of the IRS. See *U S v Cohen* 388 F 2d 464, 68-1 USTC 9140 (CA 9 1967) *U S v Judson* 63-2 USTC 9658 (CA 9 1963).

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ceeding. The case at bar, as all sides concede, is not purely civil. A criminal prosecution was imminent at the time the government sought production of the records. (Tr 19 20 23) The petitioner, of course, is willing to produce all documents sought if the IRS will give its assurance the case is purely civil and grant petitioner immunity from any criminal prosecution.

The government having warned taxpayer of her rights must be assumed to have been serious about the warning. The government then should have scrupulously treated the case as a criminal one and permitted taxpayer to assert her constitutional rights by once again bringing her records into her possession. In *United States* v. *Heffner,* 420 F2d 809, 70-1 USTC ¶9152 (1970), based on *United States ex rel Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954) the Court held that once the government promulgates a rule, it must scrupulously adhere to that rule or evidence obtained in contravention of the rule will be inadmissable. The Court further held the fact that the warning required by News Release No. 897 (substantially the warning given to taxpayer here) may have been more generous than that required by the Constitution was not significant. The Petitioner alleges in the case at bar the government has flaunted its own administrative dictate by attempting to circumvent taxpayer's constitutional rights by maintaining a facade of a civil case when the government itself has treated the case under the rules it has established for criminal cases.

A

The privilege against self-incrimination is the shield of the taxpayer as soon as the finger of accusation turns toward her.

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The holding enunciated in *Graf* (Supra) is similar to the result reached in *U. S. and Weaver* vs. *Kleckner* 273 F Supp 251, 67-2 USTC 9536 (1967). The IRS directed a summons to Kleckner to deliver records belonging to Logan which were then in Kleckner's possession, the purpose of the probe being to discover evidence for a contemplated criminal action against Logan. The Court correctly noted that Logan could not be compelled to produce the papers himself and that Kleckner was not the owner and hence was not compellable to deliver them. Your Petitioner contends the above result is the necessary one in cases involving possible criminal action. In the case at bar the obvious purpose of the investigation was to discover further evidence to substantiate the investigating agent's belief of the existence of criminal tax fraud. (Tr 19, 20) The Petitioner maintains that at the time the government issued the summons to the bookkeeper, its main purpose was the conduct of a criminal investigation. The finger of accusation then began to point to petitioner. The IRS has admitted as much when its agent testified that he proceeded past the point in his investigation when he suspected fraud in order to substantiate his suspicions. (TR 20) The services of an intelligence agent were then requested and the petitioner was advised of her constitutional rights. The investigation was no longer a wholly civil one. The 5th amendment is the petitioners shield and the IRS may not avoid it by trying an end run around her defense by claiming it was conducting a simple, good faith civil investigation or by avoiding the reality of the ownership of the records. Certainly it is suspicious that the next morning after having advised Taxpayer of her rights, Agents immediately proceeded to Book-

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keeper's Office to obtain the records before petitioner herself could physically recapture them.

B

The accused need not have her records in hand in order for her testimony contained therein to be privileged from the probe of the accusor. The protection afforded by the 4th and 5th amendments to the Constitution would only be an empty promise if a citizen's records are not protected in a complex, modern society.

The fact that petitioner's bookkeeper rather than petitioner had possession of the records is not relevant. Mr. Shaffer, the bookkeeper was at all times subject to her orders. He was only holding the records for petitioner as her agent and as a naked possessor of the items. The transcript demonstrates Shaffer only observed the records, he did not construct any new, independent records of his own from them. (Tr 7, 8) The petitioner concedes that any records belonging solely to Bookkeeper, even though constructed utilizing petitioners records, would be subject to process whether in her hands or his and despite her assertion of 5th amendment rights. The 5th amendment protects one from testifying against himself but not from preventing the testimony of others.[2]

The law is also clear though that a summons cannot be directed successfully against a mere possessor who has in his hands the personal records of another when the

[2] A custodian may not assert his 5th amendment privilege to quash a summons requiring he produce records of another in his possession. *Essoce of Ohio* v. *U. S.* 262 US 151 (1923); *Wilson* v *U. S.* 22 US 361 (1911).

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owner asserts his privilege under the 5th amendment. The case of *U. S.* vs. *Guterma* 272 F2d 344 (CA 2, 1959) dealt with a similar situation although the Court there was careful to note that the factual situation is not of importance, but rather of the utmost importance is the question of to whom the seizure is finally directed. Guterma kept his records in a safe on Jacobs' premises. The government directed a summons to Jacobs ordering him to deliver the materials to it. Guterma then intervened and asserted his 4th and 5th amendment rights. The Court appropriately looked through the facade of mere possession and held that ultimately Guterma himself was the object of the summons and thus it was not enforceable. The constitutional intent to throw a protective screen around the individual is the fundamental factor, not the technicalities of possession.

The basic legal condition emerges that the owner, the individual to whom the summons is ultimately directed, can quash a summons which has been served on another party who is a naked possessor of the first party's own records. The dilemma in such a situation can easily be resolved by asking "If the papers were in the hands of their owner would they be privileged?" If the answer to that question is "yes" then the government should not be allowed to circumvent the rights of the owner for the sole reason that ownership and possession do not happen to coincide in one individual at the time the summons is served.

The basic principle that a subpoena should be directed to the owner rather than a naked possessor has been recognized earlier in *Schwimmer* vs. *U. S.* 232 F2d 855 (CA8, 1956). Attorney Schwimmer had closed

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his law offices and stored his files together with those of his clients at the Dean Rubber Manufacturing Company. In the course of an investigation into alleged bribery and tax matters, the government directed a subpoena to Dean requiring that it deliver up all of the records in its possession. Schwimmer thereupon intervened asserting his right to be free from unreasonable searches and seizures but not his right of freedom from self-incrimination. The Court decided that the subpoena was ultimately directed to Schwimmer himself although it was technically served on Dean. Schwimmer therefore, had a right to intervene and was able to successfully assert his 4th amendment rights. The Court looked to the rights of the owner and did not become confused by the happenstance of mere possession saying, at 861, "Schwimmer legally had such possession, control, and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizure to be escaped through the mere procedural device of compelling a third party naked possessor to produce and deliver them." The case at bar does not materially differ from Schwimmer. In each the actual owner of the document should not be deprived of substantial rights when he has entrusted the records without transferring ownership to another.

The basic principles of the case at bar were laid down in *Boyd* vs. *U. S.* (Supra) The Court did not then deal with the particular possession question now before it, but if it had the Petitioner contends the result would be the same for as was said there, "any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that

judgment. In this regard the 4th and 5th amendments run almost into each other," at 861.

C

The IRS will find it increasingly difficult to conduct tax investigations if the owner of records cannot assert his 5th amendment rights when they are out of his possession.

The great difficulty looming in the shadows which this case portends will be the increased difficulty of administering the Internal Revenue laws if the position of the government is maintained. The problem has apparently been noted judicially.[3] The administration of the affairs of a taxpayer has become increasingly complex and many taxpayers have become obliged to entrust their records to an individual who prepares and formulates the data in a fashion so that it is presentable to the government for revenue purposes, yet the taxpayer has not intended to strip himself of either his ownership of his documents or of his rights under the Constitution. If the taxpayer is advised that his rights are unprotected when he leaves his records with his accountant or attorney then he will have no motive to cooperate with the government when it desires to audit or investigate his tax returns by making the documents easily accessible. Instead he will gather up his records and hold them in his immediate, personal possession so as to preserve his

[3] *Stuart* v. *U. S.* 416 F 2d 459 69-2 USTC 9630 (1969)
Taxpayer permitted to assert his privilege against self-incrimination when government issued summons requiring taxpayer's bookkeeper to deliver taxpayer's records in his possession. Government had earlier requested that taxpayer deposit records with his bookkeeper in order to facilitate IRS investigation.

rights. In the long run the burden thus created will be to the detriment of both the government and taxpayer by increasing the difficulty of the government's investigation even in the case where wholly civil matters are being probed. At the very least, the taxpayer will have no reasonable assurance by leaving his records at such offices where they are easily examined that he will not be jeopardizing his rights if the suspicion of impropriety arises.

II

The sections of the Internal Revenue Code under consideration are civil laws, not criminal ones.

A

The IRS has used a civil statute to facilitate a patently criminal investigation and has misused the law. The civil law does not provide necessary safeguards present in the criminal law to protect the rights of the accused.

The Trial Court did not have jurisdiction as the use of Internal Revenue Code Section 7402 and Section 7406 in the case at bar was a manifestly criminal one while the intent of the Sections is to provide for actions manifestly civil in nature with only possible criminal overtones.

The case at bar had clearly progressed to the point where its criminal nature over-shadowed any actual civil investigation; therefore, the summons issued under Sections 7402 and 7406 of the Internal Revenue Code of

1954 was misused as the statute is a civil one, not a criminal one. This Court in *Donaldson, FKA Sweet* vs. *U. S.* et al 27 L Ed 2d 580, 400 US 517, 91 SCt 534 (1971) laid out certain guidelines for the use of the summons authorized by the above cited sections of the Internal Revenue Code which have not been adhered to in the case at bar. Your petitioner alleges that the IRS did not act in "good faith" in issuing the summons and that the clear purpose of the summons was to obtain evidence for use in a criminal prosecution. If there was any motive for discovering the supposed civil liability of the petitioner its importance had been virtually reduced to a nullity at the point in time when the summons was issued. The Court in *Donaldson* (Supra) recognizes the validity of a summons issued under Sections 7604 and 7606 where the purposes of the summons are civil with only the possibility of a criminal prosecution if the summons is issued in "good faith" and prior to a recommendation for prosecution. The petitioner contends that the action of the government agent in his carrying investigation beyond the point where he was merely suspicious of fraud to the point where his suspicions were confirmed (Tr 19) flaunts the rule enunciated in *Donaldson* (Supra) and constitutes the use of the section for the substantially single purpose of obtaining evidence for a criminal prosecution. The technicalities of the IRS procedure as to calling in a special agent are generally not crucial for the purposes of determining when the case becomes criminal, but they can be important in the context of a particular case. The intelligence agent was called into the case at bar not to ascertain the existence of tax fraud but to substantiate the alleged fraud which the first agent had already ascertained. The petitioner, contends that the Court should examine the totality of cir-

cumstances surrounding the case in order to determine whether or not the statute has been correctly utilized for its intended purpose and in accord with constitutional guarantees. It would be a trespass on the law to permit the government to maintain a civil disguise for its investigation when its agents have already determined that they are chiefly interested in criminal fraud in order for the government to utilize the readily available power of a mainly civil statute to ferret out evidence sought for a criminal prosecution.

In the case at bar, the intelligence agent stated that his main purpose in this investigation was to substantiate evidence of tax fraud which the initial investigation by another agent had ascertained. (Tr 23) The Court must look at this in light of first agent's admission that he had gone beyond the point of mere suspicion to the point of confirmed suspicion. (Tr 19) The aim of the investigation was criminal, not civil. The statute was, therefore, misapplied according to the guideline formulated for its proper use as set forth in *Donaldson*.

The Court in *Donaldson* carefully distinguished the facts of that case and noted it was not a case in which the records in the hands of the party at whom the summons was directed belonged to the taxpayer or in which the taxpayer had a proprietary interest. The line of cases from which *Donaldson* evolves all share a common fact situation: the government is attempting to have records belonging to X brought forward which are in X's possession but which relate to X's dealings with Z, the taxpayer.[4] In none of the cases did the Court find

[4] *Reisman* v. *Caplin* 375 US 440, 11 LEd 2d 459 (1964) at 466
Wild v. *United States* (362F 2d 206 at 209 (1966)
Venn v. *United States* 400F 2d 207 at 210 (1969)

that the taxpayer had established any ownership rights in the records.[5] The summons as applied to those situations, whether civil or criminal, extracts information only from the records or mouth of another party. Neither the records nor the mouth are those of the taxpayer. An exception would be those cases in which the person who has possession of the documents is the majority shareholder of the corporation which owns them or an officer of the organization which owns them.[4] When, however, the situation is reversed and the records in the hands of X belong to taxpayer then the interpretation of the code section must surely alter. The IRS is not simply asking another to tell what he knows about his business with taxpayer. The government is asking the taxpayer to disclose his own dealings. The situation whether wholly accusatory or only partially accusatory must necessarily allow the taxpayer to protect his rights. The Constitution does not drop its shield in front of the taxpayer only when he is faced with the actual indictment. It also protects him during the preparatory and investigatory stages.[6] The protections contemplated by the 4th and 5th amendments would be of little value otherwise. As the statute applies to the case at bar, then, it has been misused and is void. The government may not be permitted to use it against the taxpayer himself or his personal records.

The case at bar is analogous to *Deck* v. *U. S.* 339F2d-739. (1964). There the government directed a summons to Deck, attorney for taxpayer Kless who was under investigation, seeking to have produced certain work

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[5] *U. S. v. Roundtree* (CA5, 420 F2d 485 1969)

[6] *Miranda* v. *Arizona* 384 US 436 (1966)
Escobedo v. *State of Illinois* 378 US 478 (1964)

papers allegedly belonging to Phillips, an accountant who had prepared tax returns for taxpayer Kless. Kless intervened in the action and claimed the papers belonged to him; however, the court ruled that the work papers belonged to the accountant. The Court considered the ownership of the papers important to the outcome of the case and concluded that as ownership was in Phillips that Deck would be compellable to produce them in spite of taxpayer Kless' assertion of privilege. The inference here though is that if the papers had belonged to Kless, but in Deck's hands, they would not have been reachable via a summons. Ownership of work papers produced by an accountant was subsequently held to be determinative of whether or not the papers were reachable via an IRS summons, when in the hands of the client-taxpayer.[7]

CONCLUSION

For the reasons set forth above, your Petitioner prays that the enforcement of the summons be denied.

Respectfully submitted,

LILLIAN V. COUCH
By CLAUDE D. CARTER AND
JOHN G. ROCOVICH, JR.
Counsel for Petitioner

MARTIN, HOPKINS AND LEMON
Sixth Floor Boxley Building
Roanoke, Virginia

[7] *United States v. Levy* 270 F Supp 601 at 603 (1967)

APPENDIX A

APPENDIX

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

[Amendment IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to

appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers, or other data.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry:

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named

in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

FOR THE FOURTH CIRCUIT

No. 14,546

United States of America, and
Edward F. Jennings, Special
Agent, Internal Revenue Service,

Appellees,

Versus

Lillian V. Couch,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Ted Dalton, District Judge.

(Decided October 12, 1971.)

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

John G. Rocovich, Jr., (Claude D. Carter, and Martin, Hopkins, and Lemon on brief) for Appellant, and Joseph M. Howard, Attorney, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Lee A. Jackson and John M. Brant, Attorneys, Department of Justice, and Leigh B. Hanes, Jr., United States Attorney, and James G. Welsh, Assistant United States Attorney, on brief) for Appellees.

PER CURIAM:

From 1955 until the present controversy arose, the intervenor, Mrs. Couch, regularly delivered all of her financial books, records, and documents to her accountant, Mr. Shaffer, so that he might compute and fill

out her income tax returns. These records were thereafter stored by the accountant in his office. In 1969 an Internal Revenue agent investigating Mrs. Couch's returns for the years 1964 through 1968 requested, and was permitted to review those records. During that investigation the agent became suspicious of fraudulent activity so he sought the aid of a special agent. It was customary procedure to have a special agent associated to investigate a suspected crime. Upon arrival, the special agent, Mr. Jennings, gave Mrs. Couch the *Miranda* warnings. She thereafter instructed her accountant not to permit further examination of the records.

Pursuant to authority vested in him by 26 U. S. C. A. §§ 7402 and 7604, Special Agent Jennings subpoenaed the accountant to present the records in his possession and to testify about his connected activities. Instead of complying, the accountant delivered the records to Mrs. Couch's attorney as she instructed. Thereupon, Special Agent Jennings instituted this action to enforce compliance with the subpoena. The lower court ordered the records produced, and appeal was taken from that order.

The intervenor-appellant sets out two alleged infirmities in the decision, but we find them to be without merit. She first asserts that the statutory authorization for the subpoena is strictly limited to civil suits so that its use was improper in the present case which is potentially criminal. The subpoena power is not so narrowly restricted, however, for it is well-recognized that the subpoena is proper as long as the investigation retains a legitimate civil purpose. see *Donaldson* v. *United States,* 400 U. S. 517; *United States* v. *Giordano,* 8 Cir., 419 F.2d 564; *United States* v. *Ahmanson,* 9 Cir., 415 F.2d

785; *United States* v. *Hayes,* 7 Cir., 408 F.2d 932. The District Court found after a hearing that there was "a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud * * *."

The intervenor also attempted to encompass the records within her Fifth Amendment privilege against self-incrimination. The answer to this contention lies in the fact that the records were not in the intervenor's possession but were in the custody of her accountant. She had voluntarily relinquished her control of the records. They had passed from the sphere of privilege surrounding her, for there was no accountant-client privilege. The present situation is readily distinguished from the case upon which the intervenor relies, *Stuart* v. *United States,* 5 Cir., 416 F.2d 459. The testimony there disclosed that the suspect had delivered her records to the accountant for the sole purpose of providing a more convenient time and location for conducting the pending investigation.

Affirmed.

IN THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent,	)	
Petitioners	)	
v.	)	
HAROLD L. SHAFFER,	)	CIVIL NO. 70-C-3-R
Respondent	)	
v.	)	
LILLIAN V. COUCH,	)	
Intervenor	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above-entitled case having come on to be heard on the petition and answers thereto, on the Order to Show Cause entered by the Court on January 7, 1970, the hearing thereon having been reset and held on February 2, 1970, and the Court having heard the testimony elicited, having examined the exhibits admitted into evidence, and having heard argument of counsel, and being fully advised in the premises, therefore enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action brought by the petitioners for the purpose of enforcing an Internal Revenue Service summons issued to the respondent, Harold L. Shaffer.

2. The petitioner, Edward F. Jennings, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director in Richmond, Virginia, with post of duty in Roanoke, Virginia.

3. The petitioner, Edward F. Jennings, in his capacity as a Special Agent is conducting a continuing and joint investigation with Revenue Agent Dennis L. Groves for the purpose of ascertaining the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

4. On August 18, 1969, as part of the investigation described in paragraph 3 above, an Internal Revenue Service Summons, a copy of the original of which was admitted into evidence as Respondent's Exhibit 1, was issued by the petitioner, Edward F. Jennings, directing the respondent, Harold L. Shaffer, to appear before the said Edward F. Jennings on September 2, 1969, at 9:30 a. m. to testify and to produce for examination certain books, records, and documents all of which are described in the summons.

5. On August 18, 1969, the summons described in paragraph 4 above, was served on the respondent, Harold L. Shaffer, by the petitioner, Edward F. Jennings, by handing a copy thereof to Harold L. Shaffer.

6. That the respondent, Harold L. Shaffer, has served as the tax consultant for the taxpayer, Lillian V. Couch, from 1955 to the present and has prepared her tax returns for each year from 1955 to the present.

7. The respondent, Harold L. Shaffer, while serving as tax consultant to the taxpayer, Lillian V. Couch, received from her and thereafter maintained continuous possession of the various books, records and documents described in the summons until September 2, 1969; these records, books and documents were utilized by Harold L. Shaffer for the purpose of preparing the tax returns of Lillian V. Couch for the years 1955 to the present.

8. That on August 18, 1969, Harold L. Shaffer was in possession and custody of the books, records and documents which are described in the summons for the years 1964 through and including 1968.

9. That on September 2, 1969, the respondent, Harold L. Shaffer, refused to produce the books, records and documents and to testify as required by the summons on the ground that he had delivered the papers, etc. to Mrs. Couch's attorney.

10. That on September 2, 1969, the respondent, Harold L. Shaffer, turned over the books, records and documents requested by the summons to John G. Rocovich, Jr., the attorney for Lillian V. Couch.

11. John G. Rocovich, Jr., the attorney for the taxpayer, Lillian V. Couch, is presently and at all times since September 2, 1969, has been in possession of the

books, records and documents requested by the summons.

12. On January 7, 1970, the petitioners filed this action for the purpose of judicially enforcing the Internal Revenue Service summons.

13. The respondent filed his answer to the petition on January 19, 1970.

14. On February 2, 1970, the Court granted the motion of Lillian V. Couch to intervene.

15. It is necessary for Special Agent Edward F. Jennings to examine the books, records and documents sought by the summons described in paragraph 4 above and to take the testimony of the respondent, Harold L. Shaffer, in order to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U. S. C. Sections 7402 and 7604.

2. The taxpayer may intervene to assert her rights under the Fourth and Fifth Amendments to the Constitution of the United States.

3. The petitioner, Edward F. Jennings, as a duly commissioned Special Agent of the Internal Revenue

Service is empowered to issue Internal Revenue Service summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U. S. C. 7602, and Treasury Regulation 301.7602-1 (26 C. F. R. 301.7602-1).

4. The Internal Revenue Service summons involved in this case was properly issued to and served upon the respondent in this case.

5. The Internal Revenue Service Summons described in paragraph 3 above, was issued as part of an investigation which is being conducted pursuant to a legitimate purpose, namely to determine the correctness of income tax returns and the possibility of fraud filed by Lillian V. Couch for the years 1964 through and including 1968.

6. That Revenue Agent Dennis L. Groves and the petitioner, Edward F. Jennings, are conducting a continuing and joint investigation to ascertain the correctness of the income tax returns and the possibility of fraud of Lillian V. Couch for the years 1964 through and including 1968.

7. A special agent of the Internal Revenue Service is empowered to issue an Internal Revenue Service summons pursuant to Section 7602 even though the evidence so obtained may ultimately be used in a criminal prosecution should one ever be instituted.

8. The records and testimony sought by the Internal Revenue Service summons are necessary, material and relevant to a determination of the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

9. At the request of the taxpayer and after service of the summons upon him the respondent turned the records over to John G. Rocovich, Jr.

10. The respondent was in possession of the books, records and documents requested in the summons at the time of the service of summons and should have requested the guidance of the Court before taking any action with respect to turning over the records to Attorney Rocovich, (*United States* v. *Bryan,* 339 U. S. 323, 331 (1950); *Blair* v. *United States,* 250 U. S. 273, 281 (1919); *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932).

11. The rights of all parties with respect to the records involved in this proceeding are fixed and determined on the basis of the rights as they existed at the time the summons was served.

12. Since no search or seizure of any books, records or documents in the possession of the taxpayer are involved in this proceeding, the provisions of the Fourth Amendment of the United States Constitution are not applicable here.

13. Since, at the time the summons was served, the taxpayer, Lillian V. Couch, was not in possession of the books, records and documents described in the summons, she may not assert any Fifth Amendment privilege against self-incrimination as a bar to the enforcement of the summons.

14. Since the records in question were turned over to an officer of this Court, namely, John G. Rocovich,

Jr., who now has possession thereof, this Court, acting under its general equity powers, may order Mr. Rocovich to produce those records on the same basis and on the same terms as it could were the records still in the possession of the respondent.

15. An order should be issued requiring the respondent to appear and give testimony with regard to the determination of the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

Enter:

Ted Dalton

February 25, 1970

A TRUE COPY, TESTE:
Virginia M. Ayers, Clerk

By: Carolyn Brammer
Deputy Clerk

TRANSCRIPT

(Mr. Shaffer, Bookkeeper, on Direct Examination by Mr. Street).

turn them over to her attorney.

O Did you refuse to turn the records over to them before or after you received the subpoena?

A *Before, sir.*

Q At this time you refused to turn the records over to them, did you refuse to let them look at them?

A No, sir.

Q At this time then you were willing to let them look at them, but you wouldn't give them to them to take away from your office. Is that correct?

A That's correct.

MR. STREET: That's all the questions I have, Your Honor.

MR. DOWD: May I see the subpoena that is part of the record?

CROSS EXAMINATION

(of Mr. Shaffer, Bookkeeper)

BY MR. DOWD:

Q Mr. Shaffer, do you have the duplicate copy that the Special Agent gave you of this subpoena?

A Not—Not in my possession today. I have it, sir.

Q I ask you to take a look at it, Mr. Shaffer. Would you tell me if there is another page that goes on this subpoena?

A Another page?

Q Yes. I show you a blank—a blank summons which is a duplicate and ask you if you recognize that that is more akin to the summons you received from Special Agent Jennings?

A You mean this print on the back?

Q Yes.

A Yes, sir.

Q It did have this print on the back?

A Right.

Q Mr. Shaffer, how long have you been a tax consultant for Mrs. Couch?

A How long?

Q Yes.

A Up until—I don't know the exact date, sir.

Q Has it been a year, five years, ten years?

A Oh, it has been since 19__ approximately 1955, I suppose.

Q 1955?

A '55, '56.

Q I see. When you did her work, did she turn over books and records and documents to you?

A Yes, sir.

Q And from those books and records and documents, you took information and worked up her income tax return. Is that correct?

A That's right, sir.

Q Could you describe some of the documents and books and records you had in your possession?

A Bank statements, daily—daily reported sales, and the necessary information, payroll records and what have you.

Q I see. On the date that this summons was issued to you, did you have these books, records and documents in your possession?

A Yes, sir.

Q Mr. Shaffer, I want you to take another look at the face of this summons and down under the time for the return date, would you read that statement into the record, please?

A "Failure to comply . . ."?

Q That's correct.

A "Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience."

Q Were you aware of that statement when you got the summons?

A Yes, sir.

Q Did you read that statement?

A Yes, sir.

(Mr. Groves, Internal Revenue Agent, on Cross Examination by Mr. Rocovich)

I had found while working in Mr. Shaffer's office on these days, led me to this conclusion. It was at this point that the case was referred to the Intelligence Division and my superiors.

Q Well, then you say you were there three days. Did you work on them for two days, then start to suspect some impropriety and then continue for another day, just to be sure that you were right?

A Basically, I would say this is correct. I wouldn't say I worked exactly two days before I suspected anything or a day and a half or three days. It was part of this two or three day period. At the moment, I don't recall exactly how many days I worked at Mr. Shaffer's office.

Q Then you proceeded a little further, confirming your suspicions.

A This is correct.

Q Right. So after the point at which you suspected some impropriety, you continued to work for a little while. Is that right, basically?

A I referred the information to my superiors at that point.

MR. ROCOVICH: Thank you.

MR. STREET: I want to ask one more question, Your Honor.

REDIRECT EXAMINATION

(of Mr. Groves, Internal Revenue Agent)

BY MR. STREET:

Q Mr. Groves, is it true, as Mr. Dowd stated here in his objection, that you suspected fraud before you turned—before you called in Mr. Jennings? Was his statement correct?

A I wouldn't say necessarily that I suspected fraud. I found that there was, to me, a substantial understatement of gross income. It is not for me to determine whether this is fraud.

Q No, I didn't ask you if you thought there was fraud. I asked you if it was true—was his statement true, that you suspected fraud.

A This is true.

MR. STREET: That's all.

MR. DOWD: We have no further questions, Your Honor.

THE COURT: All right. You are excused.

MR. ROCOVICH: I would like to call Mr. Jennings.

THE COURT: Very well. Come around, Mr. Jennings.

(Mr. Jennings, Special Agent of Internal Revenue Service, on Direct Examination by Mr. Rocovich)
case assignment sheet?

A The source of the case was Audit Division.

Q Say anything else as to why there was suspected fraud or—

A My best recollection is that it stated that there was an understatement of gross receipts.

Q All right. Basically, what is the difference between a Special Agent and an Internal Revenue Agent?

A An Internal Revenue Agent, according to my understanding, makes audits of income tax returns, and they are concerned with determining the correct tax liability of any given taxpayer. That's generally what they do.

Q Yes.

A My primary function is to investigate the possibility of income tax fraud against the revenue of the United States.

Q Criminal fraud, that is, basically?

A Criminal fraud. Correct. Now, in conjunction with that, we investigate civil fraud also, but the primary function you asked, I believe.

Q All right. Your are familiar with Internal Revenue News Release 941, aren't you, involving warnings to taxpayers?

MR. DOWD: I object to the relevance. I don't know how it is relevant here.

(Mr. Jennings, Special Agent at Internal Revenue Service, on Cross Examination by Mr. Street)

Q But do I understand you correctly that you don't remember whether you asked him to sit there in the office and look at the records or not? Do you remember whether you asked him to allow you to remain there in the office and to look at the records, without taking pictures of them?

A My best recollection is that we asked him—

Q Do you remember specifically?

A —if we could work on—work on the records, and Shaffer replied that the taxpayer was going to get an attorney, and he couldn't let me see them.

Q He told you that he could not let you see them, period. Is that right?

A I believe that's right.

Q Are you sure?

A That's my best recollection.

Q Can you be positive?

A I can't be positive. No.

MR. STREET: Thank you, sir.

THE COURT: All right. Thank you, Mr. Jennings. You may take your seat.

Any further evidence?

MR. STREET: Your Honor, I would like to put Mr. Shaffer back on in rebuttal to that witness who was called by Mr. Rocovich.

THE COURT: All right.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-889

LILLIAN V. COUCH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (A. 3-5) [1] is reported at 449 F.2d 141. The district court's findings of fact and conclusions of law (A. 6-12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971. The petition for a writ of certi-

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[1] "A." references are to the record appendix filed by petitioner. Appendices A, B, C, D, and E are bound with this brief.

orari was filed on January 10, 1972, and was granted on April 3, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an internal revenue summons may be employed in a joint investigation of both the taxpayer's civil tax liability and her possible criminal liability for income tax fraud.

2. Whether an internal revenue summons requiring an accountant to produce a client's business and tax records relating to prior taxable years for which returns had already been filed, such records being in the accountant's possession, violates either the client's privilege against self-incrimination or her right to be secure from unreasonable searches and seizures.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth and Fifth Amendments to the Constitution of the United States and of 26 U.S.C. 7402, 7602, and 7604, are set forth in Appendix A, *infra*.

STATEMENT

On January 7, 1970, the respondents (the United States and Edward F. Jennings, a Special Agent of the Internal Revenue Service) filed a petition (Appendix B, *infra*) in the United States District Court for the Western District of Virginia, asking the court, pursuant to Sections 7402(b) and 7604(a) of the

Internal Revenue Code of 1954, 26 U.S.C. 7402(b) and 7604(a), to enter an order enforcing an internal revenue summons (A. 8). The summons (A. 59-60) had been issued on August 18, 1969, pursuant to 26 U.S.C. 7602, to investigate the tax liability of petitioner for the years 1964, 1965, 1966, 1967, and 1968. It was directed to Harold L. Shaffer and called on him to produce on September 2, 1969:

> All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.

Shaffer was an accountant (although not a CPA) who had acted as petitioner's tax consultant for several years.[2]

An answer (Appendix C, *infra*) was filed on behalf of Shaffer alleging that he no longer possessed any workpapers or other documents described in the summons that were his own property and that all the described documents that were in his possession when the summons was served were the property of petitioner. The answer also alleged that on September 2, 1969, he was unable to furnish the requested documents to Special Agent Jennings because he was no longer in possession of them.

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[2] In her brief, petitioner repeatedly refers to Shaffer as her employee (*e.g.*, Br. 5, 7), but there is nothing in the record to support this characterization. Shaffer described his occupation as "Tax consultant" and his relationship to petitioner as "Only * * * a relationship of preparing her income tax returns in the past" (A. 16).

Petitioner filed a motion to intervene which was granted by the district court (A. 9), and petitioner filed an answer (Appendix D, *infra*) alleging that she was the owner of the records in question, that their delivery to Shaffer was temporary only, and that Shaffer had been directed by her to return the records before Shaffer was served with the summons. The answer further alleged that the Internal Revenue Service investigation was being conducted for the sole purpose of obtaining evidence concerning criminal violations, and it argued that the summons should not be enforced because to do so would abridge petitioner's privilege against self-incrimination and her right to protection from unreasonable search and seizure.

An evidentiary hearing was held by the district court. Revenue Agent Dennis L. Groves of the Audit Division testified that he had found indications of a substantial understatement of gross income by petitioner after examining her books and records in Shaffer's office with Shaffer's permission and that he thereupon recommended that the case be reported to the Intelligence Division, as required by Internal Revenue Service regulations (A. 27, 29-31).

Special Agent Jennings, of the Intelligence Division, testified that he commenced a joint investigation with Agent Groves after the case was received from the Audit Division, and that his own functions included (1) determining the correct tax liability, (2) investigating the possibility of income tax fraud and recommending for or against imposition of fraud

penalties, and (3) making a recommendation on a possible criminal tax violation (A. 34-36, 40-41). He further testified that he had introduced himself to petitioner and had given her a *Miranda* warning, as required by a directive of the Internal Revenue Service (A. 37-38), and that he issued the summons to Shaffer after the latter had refused to let him see the records and had denied him permission either to remove the records or to microfilm them in Shaffer's office (A. 42-44).

Shaffer testified that he had performed tax consulting services for petitioner since 1955 (A. 21). These services consisted of preparing petitioner's tax returns from bank statements, daily reported sales and payroll records, and other records furnished to him by petitioner; these records remained in his possession until the morning of September 2, 1969, when, at petitioner's request, Shaffer delivered the records to her attorney (A. 16, 19, 21-24). Shaffer previously had allowed Agent Groves to examine the records and he testified that he would have allowed Special Agent Jennings to examine them but not to microfilm them or to remove them from his office (A. 17, 20, 45). Shaffer did not prepare workpapers from petitioner's records but at the hearing he stated his willingness to testify before the agents as to his knowledge of the records (A. 19, 25-26).

The district court found, *inter alia*, (1) that Special Agent Jennings was, with Agent Groves, conducting a joint and continuing investigation for the purpose of determining both the correctness of petition-

er's tax returns for the years 1964-1968 and the possibility that those returns were fraudulent, and (2) that it is necessary for Jennings to examine the summoned records and to take the testimony of Shaffer in aid of these purposes (A. 6-9).

The district court's legal conclusions were that the summons was issued as part of an investigation which is being conducted for the purposes of determining the correctness of petitioner's tax returns and the possibility of fraud therein; that the summoned records are necessary, material and relevant to such a determination; that the summons was properly issued and served on Shaffer even though the evidence so obtained may ultimately be used in a criminal prosecution against petitioner, should such prosecution ever be instituted; and that since petitioner was not in possession of the summoned records when the summons was served, and this proceeding involves no search or seizure of records in her possession, petitioner cannot assert either the Fourth Amendment or her privilege against self-incrimination under the Fifth Amendment as a defense to enforcement of the summons (A. 10-12).

The district court ordered the summons enforced (Appendix E, *infra*). Because the records, after service of the summons but before its return time, had been surrendered by Shaffer to petitioner's attorney, the court's order required the latter to produce the summoned records for inspection and copying by the Internal Revenue Service. The court of appeals affirmed *per curiam*, holding that (1) issu-

ance of the summons was proper since the investigation retained "a legitimate civil purpose" and (2) the records passed from the sphere of petitioner's privilege against self-incrimination when she voluntarily relinquished her control over them to her accountant (A. 3-5).

SUMMARY OF ARGUMENT

I

The internal revenue summons here was issued in aid of a joint investigation of petitioner's civil tax liability and of her possible criminal liabilty for income tax fraud. At the time of the issuance of the summons there had been no recommendation for petitioner's prosecution nor any determination that any such recommendation would be forthcoming. Issuance of the summons was therefore within the statutory authority of the Internal Revenue Service. *Donaldson* v. *United States*, 400 U.S. 517.

II

A. The Fifth Amendment privilege against self-incrimination is "a prohibition of the use of physical or moral compulsion to extort communications from [the individual asserting the privilege]." *Holt* v. *United States*, 218 U.S. 245, 252-253. Compulsion upon the person asserting it is an essential element of this privilege. Thus, although this Court held in *Boyd* v. *United States*, 116 U.S. 616, that one may not be compelled to produce written statements in his possession that might tend to incriminate him, the

Court has repeatedly held that the privilege does not bar compulsory production of documents from a third party. *Johnson* v. *United States*, 228 U.S. 457; *Perlman* v. *United States*, 247 U.S. 7; *Burdeau* v. *McDowell*, 256 U.S. 465. It is the compelled production of documents from the person being incriminated, and not the compelled production of documents tending to incriminate their nonpossessory owner or author, that is forbidden by the privilege. Since petitioner did not have possession of the papers covered by the summons, the order enforcing the summons involves no testimonial compulsion upon her and is not violative of her Fifth Amendment privilege.

Retention of tax records by an accountant is not materially different from other situations involving third-party possession of incriminating documents. There is no accountant-client privilege of confidentiality under federal law. *E.g.*, *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864. There is no reason in law or logic why the government should not have compulsory access to non-privileged disclosures made to an accountant, no matter in what form made. Such access does not conflict with the policies or historic purposes of the privilege against self-incrimination. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55. The decisions cited by petitioner do not hold otherwise.

B. The Internal Revenue Service, in issuing the summons here, met the requirements set forth by this Court in *United States* v. *Powell*, 379 U.S. 48, and enforcement of the summons therefore does not

violate petitioner's Fourth Amendment right to be secure from unreasonable searches and seizures. Furthermore, in view of petitioner's purpose in disclosing information to her accountant and his responsibility as preparer of her tax return, petitioner could have had no reasonable expectation of privacy with respect to the information disclosed.

ARGUMENT

I

THE INTERNAL REVENUE SUMMONS HERE WAS PROPERLY ISSUED IN A JOINT INVESTIGATION OF TAXPAYER'S CIVIL TAX LIABILITY AND OF HER POSSIBLE CRIMINAL LIABILITY FOR INCOME TAX FRAUD.

Petitioner contends (Br. 8-11, 17-21) that the investigation here "was a manifestly criminal one" (Br. 17) and that use of a summons in aid of this investigation consequently was outside the scope of the summons provisions of the Code, 26 U.S.C. 7402, 7602, and 7604. However, petitioner's characterization of the investigation is erroneous. The investigation here was a joint investigation of petitioner's civil tax liability and of her possible criminal liability for income tax fraud. Issuance of an internal revenue summons in aid of such an investigation was expressly held to be within the statutory authority of the Internal Revenue Service in *Donaldson* v. *United States*, 400 U.S. 517.

1. The purpose of the investigation or audit initiated by Agent Groves was to determine petitioner's

correct tax liability for the years in question (A. 31, 35). Because his discovery of "[e]xcessive spending over known receipts" (A. 30) indicated a substantial understatement of gross income and therefore the possibility of fraud, he referred petitioner's case to the Intelligence Division as required by Internal Revenue Service regulations (A. 29-31). Contrary to petitioner's assertion (Br. 11, 18-19), Agent Groves had not established the existence of fraud prior to referral (A. 32-33).

After petitioner's case had been referred to the Intelligence Division and to Special Agent Jennings, Agent Groves continued his audit of petitioner's income tax returns (A. 29). Special Agent Jennings and Agent Groves were conducting a joint investigation in which they first had to determine whether the tax liabilities reported on petitioner's tax returns were correct before they could even begin to arrive at a conclusion concerning the possibility of tax fraud (A. 34, 40), and the district court correctly so found (A. 10). The summons was issued in furtherance of that joint investigation (*ibid.*).

Thus the investigation here is precisely the kind contemplated by the Court in *Donaldson*, where it was noted that "the special agent may well conduct his investigation jointly with an agent from the Audit Division" and that "their combined efforts are directed to both civil and criminal infractions * * *." 400 U.S. at 535. Furthermore, as in *Donaldson*, there has been no recommendation in this case for petitioner's prosecution.

2. The statutory aspect of this case, therefore, is governed by *Donaldson*, where this Court held that "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U.S. at 536. The Court explained (*id.* at 533, 535-536):

> Any other holding, of course, would thwart and defeat the appropriate investigatory powers that the Congress has placed in "the Secretary or his delegate." * * *
>
> * * * * *
>
> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. * * * To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons, or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus stultify enforcement of federal law. * * *

Accordingly, issuance of the summons here was within the statutory authority of the Internal Revenue Service.

II

AN INTERNAL REVENUE SUMMONS REQUIRING AN ACCOUNTANT TO PRODUCE A CLIENT'S BUSINESS AND TAX RECORDS IN THE ACCOUNTANT'S POSSESSION DOES NOT VIOLATE THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION OR HIS RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. The Summons Enforcement Order Did Not Violate Petitioner's Privilege Against Self-Incrimination.

1. *The Privilege Against Self-Incrimination Does Not Apply to Nonpossessory Interests in Books and Records.*

The order of the district court requires production of those business and tax records of petitioner that were in her accountant's possession at the time the summons was issued.[3] Relying principally on *Boyd* v. *United States*, 116 U.S. 616, petitioner contends (Br. 11-16, 21-23) that this order violates her Fifth Amendment privilege not to "be compelled * * * to be a witness against [herself]."

In *Boyd*, this Court held that the plaintiff-in-error there could not be compelled to produce written statements in his possession that might tend to incrimi-

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[3] He delivered the records to petitioner's attorney on the return date of the summons. This was a violation of the summons (A. 50). Neither constitutional nor other rights can be enlarged by action of this kind, and petitioner does not contend otherwise. See *United States* v. *Zakutansky*, 401 F.2d 68, 72 (C.A. 7), certiorari denied, 393 U.S. 1021; *United States* v. *Lyons*, 442 F.2d 1144 (C.A. 1). The district court properly held that in exercise of its equity powers it could therefore order production from petitioner's attorney on the same basis as from her accountant.

nate him.[4] The critical difference between the present case and *Boyd* is that the person here asserting the privilege against self-incrimination is not in possession of the written statements in question and is not being compelled to produce them. Petitioner would extend *Boyd* to protect her nonpossessory ownership interest. Such an extension of the privilege against self-incrimination is not justifiable in terms of the interests served by the Fifth Amendment and would be contrary to previous decisions of this Court.

In *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, this Court set forth at length the policies and purposes of the privilege against self-incrimination:

> * * * our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government * * * in its contest with the individual to shoulder the entire load," * * *; our respect for the inviolability of the human personality and of the right

[4] This result was criticized in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U.Cin.L.Rev. 671, 701-703 (1968), where it is argued that the production of documents, as contrasted with oral testimony, ought not to be protected by the privilege against self-incrimination.

> of each individual "to a private enclave where he may lead a private life," * * *.

None of these values is impaired by requiring the production of documents from a third person. The internal revenue summons here does not confront petitioner with the "cruel trilemma of self-accusation, perjury or contempt"; it is not "inquisitorial" in nature and its enforcement, not being directed at petitioner, could not threaten her with "inhumane treatment and abuses"; it represents an effort by the government "to shoulder the entire load" of a tax investigation without making direct recourse to the taxpayer, and it does not intrude into any possessory or psychological "private enclave" maintained by petitioner.

The hallmark of the privilege against self-incrimination is protection of the individual from government compulsion to testify against himself. Compulsion upon the person asserting it is an essential element of the privilege. See, *e.g.*, *Holt* v. *United States*, 218 U.S. 245. Thus in *Johnson* v. *United States*, 228 U.S. 457, this Court held that the books and records of a bankrupt, having passed into the hands of the trustee in bankruptcy, could be introduced in evidence against the bankrupt in a prosecution for concealing money from the trustee. The relevant limitation of the privilege against self-incrimination was there succinctly stated for the Court by Mr. Justice Holmes (*id.* at 458): "A party is privileged from producing the evidence but not from its production."

Since the bankrupt petitioner in *Johnson* had been divested of title to his financial records by force of law, that decision, although broadly rested on the absence of any compulsion against the person asserting the privilege, is technically consistent with petitioner's claim here, which is based on ownership. However, a claim essentially identical to that of petitioner here was squarely rejected in *Perlman* v. *United States*, 247 U.S. 7, 15, where the Court, in permitting the presentation to a grand jury of documents tending to incriminate their non-possessory owner, stated:

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent * * * [and] that the owner of property must be considered as having a constructive possession of it wherever it be and in whosoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. * * * [This contention] is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

Similarly, in *Burdeau* v. *McDowell*, 256 U.S. 465, 476, where the owner of stolen papers sought to prevent their use against him in a criminal prosecution, the Court observed:

> We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that

> such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

The principle that emerges from these cases is that the privilege against self-incrimination does not bar compulsory production of documents from third parties, even if those documents would tend to incriminate their nonpossessory owner. As a commentator has observed, "* * * the privilege can be invoked only to protect one's own books which are in one's own possession and which are self-incriminatory. The guaranty may generally be considered inapplicable without the existence of this trinity of ownership, possession and self-incrimination." Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 Brooklyn L. Rev. 70, 71 (1966). Accordingly, when this Court reaffirmed *Boyd* in *Schmerber* v. *California*, 384 U.S. 757, 764, it did so on the ground that the production of one's own papers in compliance with a subpoena involves "the compulsion of responses which are also communications." The Court held in *Schmerber* that the privilege applies only to a compelled testimonial or communicative response. Since petitioner here did not have possession of the papers covered by the summons, which was in any event directed to a third

party, "[n]ot even a shadow of testimonial compulsion upon or enforced communication[5] by [her] was involved * * *" (*id.* at 765; footnote supplied).

2. *There is No Justification for a Special Exception to Extend the Privilege to a Taxpayer's Nonpossessory Interests in Records Held by Her Accountant.*

Under the general principles just discussed, the privilege against self-incrimination is not available to petitioner here. However, petitioner, in effect, argues that retention of tax records by an accountant is somehow different from other situations involving third-party possession of incriminating documents and that the privilege should be uniquely available to taxpayers in such circumstances. Nothing in these circumstances justifies such a special exception that would extend the privilege far beyond its historic purposes and established bounds.

It is well settled and not here in dispute that no accountant-client privilege of confidentiality exists under federal law and that no such state-created privilege is recognized in purely federal cases. See,

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[5] Petitioner states (Br. 12) that the documents sought by the government were all prepared by her and written by her in longhand. The record does not support this assertion, and it is, in any event, legally irrelevant. This Court early noted that "the mere fact that the appellant himself wrote, or signed, the official letters * * * neither conditioned nor enlarged his privilege." *Wilson* v. *United States*, 221 U.S. 361, 378-379. And see *Schmerber, supra*, 384 U.S. at 764. It is the compelled production of documents from the person being incriminated, and not the compelled production of documents tending to incriminate their author, that is forbidden by the privilege.

e.g., *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864; *Gariepy* v. *United States*, 189 F. 2d 459, 463-464 (C.A. 6); *Himmelfarb* v. *United States*, 175 F. 2d 924, 939 (C.A. 9), certiorari denied, 338 U.S. 860; *Olender* v. *United States*, 210 F. 2d 795, 806 (C.A. 9).[6] Consequently, a taxpayer may assert no privilege of confidentiality in order to deny to the government either the testimony or the workpapers of the taxpayer's accountant. See, *e.g.*, *Sale* v. *United States*, 228 F. 2d 682 (C.A. 8); *Falsone* v. *United States*, *supra*. The privilege against self-incrimination is similarly unavailable to a taxpayer to prevent such disclosure. Cf. *Hale* v. *Henkel*, 201 U.S. 43, 69-70.

Since the government thus may have compulsory access to an accountant's testimony and workpapers, regardless of any privilege his client might assert,

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[6] This result is deeply rooted in Anglo-American legal tradition: "For more than three centuries it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." VIII Wigmore, Evidence § 2192 (McNaughton Rev., 1961). And a recent commentator specifically pointed out that recognition of a general accountant-client privilege might seriously hamper the government's ability to gather evidence in tax cases and therefore would not be justified in the area of federal tax investigations. Cohen, *Accountants' Workpapers in Federal Tax Investigations*, 21 Tax L. Rev. 183, 210-216 (1966).

it would be anomalous to reach the opposite result with respect to other information in the accountant's possession, merely because the taxpayer happens to own the paper on which the information is written. The form in which petitioner undertook to give the accountant the information and data he required presumably was of no significance to her. If she had communicated by word of mouth, the accountant's testimony and notes revealing what she said would be available in response to a summons. If petitioner had written to her accountant, setting forth information concerning income, expenses, and other matters relevant to the preparation of her tax returns, her letter would similarly be available, since the accountant would have acquired title upon receipt. Furthermore, if petitioner's accountant had followed the common practice of preparing workpapers setting forth in relevant detail the information contained in the books, records, bank statements, and other materials the government seeks here, those workpapers would be subject to summons. And if the accountant had supplemented his workpapers by making photocopies of some or all of his client's original records, the accountant would own the photocopies and they too would not be subject to any claim of privilege by his client.

In short, once there has been a non-privileged disclosure of the information to the accountant (no less than to any other third person), the form in which that information is recorded has no relevance in law or logic to the client's Fifth Amendment privilege.

It is no part of the purpose of that constitutional provision to put a premium on the incompleteness of the accountant's memory or of his own records, or to protect a person from evidence that he may have created. Mere title to the records in the client, without possession, is not significant for, as Mr. Justice Holmes said in *Johnson* v. *United States*, *supra* (p. 14), the client "* * * is privileged from producing the evidence but not from its production." [7]

Nor do the decisions cited by petitioner provide support for the creation of a special taxpayer privilege against production of documents held by the tax preparer. In *Stuart* v. *United States*, 416 F. 2d 459 (C.A. 5), revenue agents had initially induced the taxpayer to part with possession of her records, and the court for that reason refused to enforce a subsequent summons against the accountant to whom the records were delivered. In *Hinchcliff* v. *Clarke*, 371 F. 2d 697 (C.A. 6) (cited by petitioner as *United*

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[7] Petitioner contends (Br. 21-22) that it is unfair to enact a tax law so complex as to require ordinary taxpayers to seek professional assistance without also extending a privilege to the documents transferred to the professional in connection with preparation of the return. But precisely the same kind of claim of legal and business necessity would be equally applicable to the transfer of records to the trustee in bankruptcy in *Johnson* v. *United States*, *supra*, and to numerous other situations. The Fifth Amendment imposes no such obstacle to the ascertainment of truth in complex situations in which disclosure of information to a third person has in some sense been a necessity. The privilege protects petitioner only against being compelled herself to give testimony. Cf. *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62.

States v. *Graf*), the court, in ordering enforcement of a summons, noted that the question presented here was not in issue, for the principal taxpayer there was deceased and the government had expressly disclaimed any intention of bringing a criminal prosecution. The cases in which a taxpayer's claim was honored involved mere custodial safekeeping of records, rather than disclosure of the information they contain to a third person. *Schwimmer* v. *United States*, 232 F. 2d 855 (C.A. 8) (records left in warehouse); *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 6) (records kept in safe on another's premises with taxpayer retaining keys to the safe). These decisions do not suggest that records left with an accountant for his use in preparing tax returns[*] are immune from process. And, as explained above, the Fifth Amendment privilege against self-incrimination provides no basis for such immunity.

B. The Summons Enforcement Order Did Not Violate Petitioner's Right to be Secure Against Unreasonable Searches and Seizures.

Petitioner claims (Br. 12-16) that enforcement of the summons would violate her Fourth Amendment right to be secure from unreasonable searches and seizures. However, this claim is not further articulated and does not appear to be independent of her

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[*] Because the records sought by the government in this case relate to prior taxable years for which returns have long been filed, there is no need to decide whether the government could use an internal revenue summons to reach tax records while the accountant was preparing timely returns therefrom. In our view, however, there is no constitutional obstacle to such use of a summons.

Fifth Amendment argument.[9] In any event, the required production of documents here does not constitute an unreasonable search or seizure. In *United States* v. *Powell*, 379 U.S. 48, this Court pointed out that an internal revenue summons is analogous to other instances of administrative subpoena power, which in turn are comparable to the investigative function of a grand jury or of a court in issuing pretrial discovery orders (*id.* at 57).[10] Accordingly, the Court specified the standards the Internal Revenue Service must meet to obtain judicial enforcement of a summons as follows (*id.* at 57-58):

> * * * the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons * * *. He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *. * * * [A] court may not permit its process to be abused. Such an abuse would take place if the summons

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[9] Petitioner states only that the Fourth Amendment "prevents the government from abusing process so as to conduct an illegal search or seizure to gain testimony or evidence protected by the right of a citizen to be free of self-incrimination" (Br. 12; italics deleted).

[10] Production of the documents specified in a summons, of course, does not involve intrusion into private or business premises by a law enforcement officer to conduct a search during the course of which items other than those specified as the object of the search may be seen.

> had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer * * *.

Petitioner here does not allege that the government failed to meet the *Powell* standard,[11] nor has she made any showing of an abuse of the district court's process. The investigation here was unquestionably conducted pursuant to a legitimate purpose—the ascertainment of petitioner's correct taxable income, including the determination whether there was a basis for additional liability[12] and a possible recommendation for prosecution because of tax fraud. Petitioner's records are necessary, material and relevant to that purpose (A. 10). Furthermore, the summons was not overly broad or indefinite, but was stated with sufficient specificity to enable petitioner's accountant to identify the records sought.[13] See *Okla-*

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[11] Although the Court in *Powell* was concerned with a corporate taxpayer and did not discuss Fourth Amendment prohibitions directly, it is well established that corporations may assert a right to be secure from unreasonable searches and seizures (*e.g., Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385) and that it is within the constitutional power of Congress to provide for the administrative issuance of summonses or subpoenas under appropriate standards. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501.

[12] Civil fraud penalties are imposed by 26 U.S.C. 6653(b).

[13] This is especially true since the accountant had already permitted inspection of the books and records in question and therefore knew precisely what it was that the government requested to be produced.

homa Press Publishing Co. v. *Walling*, 327 U.S. 186; *McPhaul* v. *United States*, 364 U.S. 372.

While what we have just said suffices to answer petitioner's Fourth Amendment claim, it is also relevant to that claim to point out that petitioner could have no reasonable expectation of privacy with respect to the information disclosed to her accountant for preparation of her tax returns. In furnishing her accountant with business and tax records, petitioner impliedly represented to him that the information truthfully reflected her taxable income, expenses, and other relevant matters. Petitioner necessarily knew that this information would, in appropriate form, be embodied in the tax returns that the accountant would prepare. Having prepared a return, an accountant is required to sign the return, certifying under penalty of perjury that the return is correct to the best of his knowledge and belief. 26 U.S.C. 6065. In doing so, the accountant exposes himself to possible criminal prosecution if he has knowingly aided in the preparation of a false return. See 26 U.S.C. 7206(2); *United States* v. *Kelley*, 105 F. 2d 912 (C.A. 2); *Bateman* v. *United States*, 212 F. 2d 61 (C.A. 9); *United States* v. *Herskovitz*, 209 F. 2d 881 (C.A. 2). Thus, a third person who prepares a tax return also has his own independent interests at stake. If a return he has prepared comes under investigation, certainly he has the need—and he should also have the right—to disclose all the material in his possession on which he has relied, regardless of questions of ownership or title.

Accordingly, petitioner could not reasonably have expected that her records remained within an area of protected privacy or confidentiality. Cf. *Katz* v. *United States*, 389 U.S. 347. She had no reason to suppose that the accountant, having his own independent responsibility under the law, would conceal from the government the justification and explanation of his work. In *Boyd* v. *United States*, *supra*, the Court spoke (116 U.S. at 630) of protecting "the privacies of life." Petitioner's records in the hands of the accountant partake of no such privacies.[14] The fact that the information contained in petitioner's records was published in the form of tax returns, as petitioner expected it to be, reinforces the conclusion that no reasonable expectation of privacy was violated by the order of the district court. That all of the details in the records were not included in the returns was a matter determined not by petitioner but by her accountant, in the course of synthesizing the information for the purpose of the returns. This consideration was noted in *Colton* v. *United States*, 306 F. 2d 633 (C.A. 2), certiorari denied, 371 U.S. 951, in the course of a discussion of the attorney-client privilege, as follows (306 F. 2d at 638):

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[14] Moreover, while we do not contend that the required records doctrine of *Shapiro* v. *United States*, 335 U.S. 1, should, or need, be applied here for Fifth Amendment purposes, it is significant that taxpayers are required by statute to keep records sufficient to disclose their taxable income, deductions, and other such matters (26 U.S.C. 6001). Since the records here involved are in that category, petitioner for this reason as well could not reasonably expect her accountant to withhold them from a tax investigation.

> Not all communications between an attorney and his client are privileged. Particularly in the case of an attorney preparing a tax return * * *, a good deal of information transmitted to an attorney by a client is not intended to be confidential, but rather is given for transmittal by the attorney to others—for example, for inclusion in the tax return. Such information is, of course, not privileged. * * *

Cf. *United States* v. *Tellier*, 255 F. 2d 441, 447 (C.A. 2).[15]

In short, in view of the use to which petitioner voluntarily put the records, and the lack of any privilege of confidentiality between an accountant and his client, there was no reasonable expectation of privacy or concealment. It should not be expected that an accountant, standing toward petitioner in the relationship of an independent contractor, would rely on the records as truthful, subscribe to the resulting returns as correct, incur the potential penalties for preparing a false return, and yet be deprived of the right to disclose to tax investigators the business records upon which he relied.

Finally, contrary to petitioner's contention (Br. 22-23), the enforcement of an internal revenue summons in a case such as this furthers the government's interest in minimizing revenue losses due to underreporting of income. Investigative access to all rele-

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[15] See, also, *United States* v. *Cote*, 456 F.2d 142, 145 (C.A. 8), holding that disclosures on a tax return "waived the privilege [the attorney-client privilege] not only to the transmitted data but also as to the details underlying that information."

vant documents held by a tax preparer increases the speed, completeness and accuracy of tax investigations, and thereby renders the auditing procedure more efficient. In turn, this leads to the recovery of greater revenues and discourages future underreporting. This is of great importance to a revenue system that depends primarily on honest self-reporting by taxpayers.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

KEITH A. JONES,
Assistant to the Solicitor General.

JOHN P. BURKE,
JOHN M. BRANT,
Attorneys.

AUGUST 1972.

APPENDIX A

The Fourth and Fifth Amendments to the Constitution of the United States provide in pertinent part as follows:

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

FIFTH AMENDMENT

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 7402, 7602, and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7402, 7602, and 7604, provide in pertinent part as follows:

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in

equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No.

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

v.

HAROLD L. SHAFFER, RESPONDENT

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

Now comes the United States of America and Special Agent Edward F. Jennings, Internal Revenue Service, by their attorney, Leigh B. Hanes, Jr., United States Attorney for the Western District of Virginia, and respectfully shows unto this Court as follows:

1. This is a proceeding brought under the authority of 26 U.S.C. Sections 7402(b) and 7604(a) (1954), to judicially enforce an Internal Revenue Summons.

2. The petitioner, Edward F. Jennings is a special agent of the Internal Revenue Service, employed in Richmond, Virginia, and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C., Section 7602), and Treasury Regulations, Section 301.7602-1 (26 C.F.R. 301.7602-1).

3. The respondent, Harold L. Shaffer resides at 2233 Cantle Lane, S.W., Roanoke, Virginia.

4. The petitioner, Special Agent Edward F. Jennings has been conducting an investigation to ascer-

tain the correctness of the income tax returns of Lillian V. Aleshire also known as Lillian V. Couch for the taxable years 1964 through and including 1968.

5. Respondent, Harold L. Shaffer is in possession and control of various books, records, papers and information relating to the tax liability of Lillian V. Aleshire, a/k/a Lillian V. Couch for the taxable years 1964 through and including 1968.

6. On August 18, 1969, as part of the investigation described in paragraph 4 above, an Internal Revenue summons was issued by the petitioner, Special Agent Edward F. Jennings, directing the respondent, Harold L. Shaffer, as the custodian of the books, records and documents of the taxpayer Lillian V. Aleshire, a/k/a Lillian V. Couch to appear before Special Agent Edward F. Jennings on September 2, 1969, at 9:30 a.m., at the office of the respondent Harold L. Shaffer at 1524 Peters Creek Road, N. W., Roanoke, Virginia, to testify and to produce certain books, records and papers all as more fully set out in the attached affidavit of Special Agent Edward F. Jennings and the attached summons. An attested copy of the summons was served upon the respondent Harold L. Shaffer, on August 18, 1969, by handing to him at his office at 1524 Peters Creek Road, N. W., Roanoke, Virginia. The summons issued to the respondent, Harold L. Shaffer is attached hereto and incorporated herein as Exhibit A.

7. Due to transportation difficulties on September 2, 1969, the petitioner Special Agent Edward F. Jennings was unable to arrive at the office of the respondent until 10:10 a.m., on the same date.

8. The respondent, Harold L. Shaffer, appeared in front of his office at 10:10 a.m., on September 2,

1969, accompanied by an attorney, but failed and refused to testify and produce the records, papers and documents demanded in response to the summons described in paragraph 7 above and such failure and refusal has continued to the date of this summons.

9. It was and now is essential to the determination of the correctness of the income tax returns of the taxpayer, Lillian V. Aleshire, a/k/a Lillian V. Couch for the taxable years 1964 through and including 1968, that the testimony of the respondent, Harold L. Shaffer as the custodian of the documents, records, books and papers of the taxpayer, Lillian V. Aleshire, a/k/a Lillian V. Couch be taken and that the records, papers and documents demanded be examined as is evidenced by the affidavit of the petitioner, Special Agent Edward F. Jennings, Internal Revenue Service attached hereto as part of this petition.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondent, Harold L. Shaffer, to show cause, if any he has, why he should not comply with and obey the aforementioned summons in each and every requirement thereof.

2. That the Court enter an order directing the respondent, Harold L. Shaffer, to obey the aforementioned summons in each and every requirement thereof by ordering the attendance, and production of the records, papers and documents demanded as is required and called for by the terms of the summons before Special Agent Edward F. Jennings, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Edward F. Jennings, or any other proper officer of the Internal Revenue Service.

3. That the Court enter an order that the respondent, Harold L. Shaffer, appear for the purpose of giving testimony concerning the correctness of the tax returns of Lillian V. Aleshire, a/k/a Lillian V. Couch as to each or any of the fiscal years 1964 through and including 1968, at such time and place as may hereafter be fixed by Special Agent Edward F. Jennings, or any other proper officer of the Internal Revenue Service.

4. That the United States recover its costs in maintaining this action.

5. That the Court render such other and further relief as is just and proper.

LEIGH B. HANES, JR.
United States Attorney

By: .....
Assistant United States
Attorney

EXHIBIT A

Form 2039
(Rev. Nov. 1964)

U. S. Treasury Department—
Internal Revenue Service

SUMMONS

In the matter of the tax liability of

Lillian C. Aleshire, a/k/a Lillian V. Couch
3102 Williamson Rd.
Roanoke, Va.

Internal Revenue District of Richmond
Period(s) 1964-1968 inclusive

THE COMMISSIONER OF INTERNAL REVENUE

To: Harold L. Shaffer
2233 Cantle Lane, S.W.

At: Roanoke, Virginia

GREETINGS:

You are hereby summoned and required to appear before E. F. Jennings, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.

Place and time for appearance:

At your office, 1524 Peters Creek Road, N.W., Roanoke, Va., on the 2nd day of September, 1969, at 9:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 18th day of August, 1969.

ORIGINAL

Signature: E. F. Jennings
Title: Special Agent

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I hereby certify that I served the summons on the reverse hereof

Date Summons Served *(Day, month, year)*	Time
8-18-69	8:47 a.m.

How Summons Was Served *(Check One)*

☒ I handed an attested copy thereof to the person to whom it was directed,

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

Signature	Title
E. F. Jennings	Spec. Agent

Sec. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No.

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

v.

HAROLD L. SHAFFER, RESPONDENT

AFFIDAVIT

Edward F. Jennings, a petitioner herein, being first duly sworn, deposes and says:

1. That he is a special agent of the Internal Revenue Service with post of duty in Roanoke, Virginia, and performing his duties under the District Director of Internal Revenue, Richmond, Virginia.

2. That in his capacity as special agent, he was assigned to ascertain the correctness of the income tax returns of Lillian V. Aleshire, a/k/a Lillian V. Couch for the years 1964 through and including 1968.

3. That pursuant to such investigation on August 18, 1969, he issued an Internal Revenue summons, directing Harold L. Shaffer, who has custody of the books, papers, records and documents of Lillian V. Aleshire, a/k/a Lillian V. Couch pertaining to the correctness of her tax returns for the years 1964 through and including 1968, to appear before the petitioner, Special Agent Edward F. Jennings, on September 2, 1969, at 9:30 a.m., at the office of the respondent at 1524 Peters Creek Road, N. W., Roanoke, Virginia, and then there to give testimony and produce records described in the attached summons.

4. That on August 19, 1969, he served the summons in person upon Harold L. Shaffer a copy of which is attached as Exhibit A to the petition and made a part hereof.

5. That due to transportation difficulties he was unable to reach the office of Harold L. Shaffer until 10:10 a.m., on the return date of September 2, 1969.

6. That Harold L. Shaffer as the custodian of the books, and records of Lillian V. Aleshire, a/k/a Lillian V. Couch appeared as directed at 10:10 a.m., in front of his office on September 2, 1969, accompanied by an attorney, before the petitioner Special Agent Edward F. Jennings, but refused and failed to testify and produce the records demanded in response to the summons issued to him and such failure and refusal has continued to the date of this affidavit.

7. That the testimony and records demanded by the summons served upon Harold L. Shaffer as custodian of the books and records of Lillian V. Aleshire, a/k/a Lillian V. Couch are necessary to ascertain the correctness of the income tax returns of Lillian V. Aleshire, a/k/a Lillian V. Couch for the years 1964 through and including 1968.

EDWARD F. JENNINGS
Special Agent

Sworn to and subscribed before me this ..... day of ....., 1970.

.....
Notary Public

My commission expires: .....

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No. 70-C-3-R

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

—*vs*—

HAROLD L. SHAFFER, RESPONDENT

ANSWER OF HAROLD L. SHAFFER

FOR ANSWER to the petition filed herein upon which the order to show cause is based in the above entitled cause, Harold L. Shaffer, respondent, says:

I

That the allegations of paragraph one of the petition are denied.

II

That this respondent states that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph two.

III

That the allegations of paragraph three of the petition is admitted.

IV

That the allegation of paragraph four is denied.

V

That the allegation of paragraph five is denied.

VI

That the allegations of paragraph six are denied.

VII

That this respondent states that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph seven.

VIII

That the allegations of paragraph eight are admitted.

IX

That the allegations of paragraph nine are denied.

X

That he does not have nor has he ever had any work papers or other books, records, bank statements, cancelled checks, deposit ticket copies, or other pertinent documents pertaining to the tax liability of Lillian V. Couch as his sole and exclusive property, which were created by his own efforts; and to the extent that he may have owned or created such documents, they were lost, disposed of or destroyed long before service of said summons.

XI

That the bank statements, books, records, cancelled checks, deposit ticket copies, workpapers listed on the summons were in the sole and exclusive property of

Lillian V. Couch and were created by her efforts for her own use.

XII

That the delivery of possession to him of said books, records, cancelled checks, deposit ticket copies and workpapers by Mrs. Couch was temporary only at the will of Lillian V. Couch, and, in fact, as a result of Lillian V. Couch's request, the books, records, cancelled checks, deposit ticket copies and workpapers in question should have been returned to Lillian V. Couch long before service of the summons upon him and that respondent was in fact holding said books, records, cancelled checks, deposit ticket copies and workpapers at the will of Lillian V. Couch.

XIII

That on September 2, 1969, at 9:30 A.M., Harold L. Shaffer, did not have possession of the said books, records, deposit ticket copies, cancelled checks, and workpapers, and, therefore, could not deliver said documents to Special Agent Edward F. Jennings as directed in said summons.

That by reason of all of the above, the respondent, Harold L. Shaffer, has shown cause why he should not be compelled to testify and to produce the records, statements and documents demanded in the Internal Revenue Service Summons served upon him on August 18, 1969.

/s/ Eugene K. Street
EUGENE K. STREET
Counsel for
Harold L. Shaffer

Eugene K. Street
Attorney At Law
216 Shenandoah Building
Roanoke, Virginia 24011

I, Eugene K. Street, Counsel for Harold L. Shaffer, do certify that I have on the 19th day of January, 1970, mailed a true copy of the foregoing answer to James G. Walsh, Esquire, Assistant United States Attorney, Counsel for Petitioner, Federal Building, Roanoke, Virginia.

/s/ Eugene K. Street
EUGENE K. STREET

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No. 70-C-3-R

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

—*vs*—

HAROLD L. SHAFFER, RESPONDENT

and

LILLIAN V. COUCH, APPLICANT FOR INTERVENTION

ANSWER OF INTERVENER AS RESPONDENT

FOR ANSWER to the petition filed herein, upon which the order to show cause is based in the above entitled case, Lillian V. Couch, Intervener Respondent, says:

I

That the allegations of paragraph one of the petition are denied.

II

That this respondent states that she has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph two.

III

That the allegation of paragraph three of the petition is admitted.

IV

That the allegation of paragraph four is denied.

V

That the allegation of paragraph five is denied.

VI

That the allegations of paragraph six are denied.

VII

That the respondent states that she has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7.

VIII

That the allegations of paragraph eight are admitted.

IX

That the allegations of paragraph nine are denied.

X

That she, Lillian V. Couch, is, was and always has been the sole and exclusive owner of all books, records, cancelled checks, deposit ticket copies, work papers, bank statements, the right to possession of which is now in question.

XI

That all of said books, records, cancelled checks, deposit ticket copies, work papers, bank statements were created by her own efforts and actions and none of which were ever created by or owned by the said Harold L. Shaffer.

XII

That the delivery of possession to Harold L. Shaffer was temporary only, said Shaffer having been

directed, prior to the time the summons in question was served on him, to return all such books, records, cancelled checks, deposit ticket copies, work papers, and bank statements that he was holding at the will of Lillian V. Couch.

XIII

That the mere fact of temporary possession by said Shaffer created no right, title or interest in said Shaffer for the United States to seize.

XIV

That the mere fact that Special Agent Edward F. Jennings is assigned to the case demonstrated that the Internal Revenue Service is making a criminal investigation of Intervener respondent's affairs relating to income taxes; and

XV

That the mere fact that this show cause action is filed as a civil case does not conceal the criminal nature of this investigation; and

XVI

That the express and sole purpose of the investigation is to obtain evidence concerning any violations of criminal statutes.

XVII

That since Lillian V. Couch is, was, and always has been the sole and exclusive owner and creator of all of the said books, records, cancelled checks, deposit ticket copies, work papers and bank statements, and since this investigation is to determine whether or not Lillian V. Couch has violated any criminal

sections of the Internal Revenue Code, to order the delivery of said records to the United States would abridge her right against self-incrimination guaranteed under the 5th Amendment to the Constitution of the United States and her right guaranteed under the 4th Amendment to said Constitution to have her person and property protected from unreasonable search and seizure.

XVIII

That by reason of all of the above, the intervener respondent has shown cause why Harold L. Shaffer should not be compelled to testify and to produce the records, statements and documents demanded in the Internal Revenue Service summons served upon him on August 18, 1969.

/s/ John G. Rocovich, Jr.
JOHN G. ROCOVICH, JR.
Counsel for
Lillian V. Couch

Claude D. Carter
John G. Rocovich, Jr.
MARTIN HOPKINS AND LEMON
Sixth Floor—Boxley Building
Roanoke, Virginia 24005

I, John G. Rocovich, Jr., Counsel for Lillian V. Couch, do certify that I have on the 19th day of January, 1970, mailed a true copy of the foregoing answer to James G. Welsh, Esquire, Assistant United States Attorney, counsel for Petitioner, Federal Building, Roanoke, Virginia.

/s/ John G. Rocovich, Jr.
JOHN G. ROCOVICH, JR.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

[Clerk's Office U. S. Dist. Court at Roanoke, Va.,
Filed Feb. 27, 1970, Virginia M. Ayers, Clerk,
By Carolyn Brammer, Deputy]

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

v.

HAROLD L. SHAFFER, RESPONDENT

v.

LILLIAN V. COUCH, INTERVENOR

ORDER

The above entitled case having come on to be heard on February 2, 1970, and counsel for the Government states that there was no objection on its part to the dismissal of Harold L. Shaffer, Respondent, provided the Government can get the records of Lillian V. Couch and also the testimony of Shaffer, and it appearing to the Court that the books, records and documents described in the summons issued on August 18, 1969, to the respondent, Harold L. Shaffer, by the petitioner, Edward F. Jennings, are now in the possession of John G. Rocovich, Jr., Esquire, and it further appearing that the petitioners are entitled to inspect such books, records and documents,

It is therefore, ADJUDGED, ORDERED and DECREED that the respondent, Harold L. Shaffer, should be

and he hereby is, dismissed from this proceeding, it is further ORDERED that the motion to intervene Lillian V. Couch be granted; and it is further ORDERED that John G. Rocovich, Jr., Esquire, appear before the petitioner, Edward F. Jennings, at the United States Attorneys office, U. S. Post Office Building, Roanoke, Virginia, at a time and place to be agreed upon mutually for the purpose of producing for examination and/or copy by photostating copy or other mechanical means of reproduction, the following books, records and documents of Lillian V. Couch for the years 1964 through and including 1968:

> All books, records, bank statements, cancelled checks, deposit tickets, copies, work papers, and all other documents pertaining to the tax liability of the above taxpayer.

In the event the petitioner, Edward F. Jennings, and John G. Rocovich, Jr., cannot mutually agree on a time and place, then John G. Rocovich, Jr., is ordered to appear at a time and place designated by the petitioner, Edward F. Jennings; notice of said time and place will be given to John G. Rocovich, Jr., by the petitioner by means of a certified letter mailed to John G. Rocovich, Jr., at his last known address at least ten (10) days prior to the date set by the petitioner.

It is further ORDERED that the respondent, Harold L. Shaffer, shall appear before the petitioner, Edward F. Jennings, at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

Upon the oral request of John G. Rocovich, Jr., Esquire, and with consent of counsel for the pe-

titioners, a stay of execution of this order is granted for a period of thirty (30) days from the date of entry of same to permit John G. Rocovich, Jr., Esquire the opportunity to file an appeal from this final order.

The clerk is directed to send copies of this order and copy of findings of fact and conclusions of law to counsel of record.

ENTER:

/s/ Ted Dalton
U. S. Chief District Judge

February 25, 1970

A TRUE COPY, TESTE:

VIRGINIA M. AYERS, Clerk

By: CAROLYN BRAMMER
Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 473013 47

COPY

FILED
NOV 13 1972

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

SUPPLEMENTAL BRIEF ON THE MERITS

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED
JANUARY 10, 1972
CERTIORARI GRANTED APRIL 3, 1972

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JOHN G. ROCOVICH, JR.
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ROANOKE PRINTING CO., INC., ROANOKE, VA.

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IN THE

Supreme Court of the United States

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

SUPPLEMENTAL BRIEF ON THE MERITS FOR PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the 4th Circuit is set forth at page A-3 of the Single Appendix. The opinion of the District Court for the Western District of Virginia is set forth at page A-6 of the original brief for the petitioner.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254. The petition for certiorari was filed within the ninety day period fixed by law from the judgment of the Circuit Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Set forth on page 2 of the original brief of the petitioner.

QUESTIONS PRESENTED

Set forth at page 4 of the original brief of the petitioner.

STATEMENT OF THE CASE

Set forth at page 5 of the original brief of the petitioner.

SUMMARY OF ARGUMENT

A recently reported case, *United States of America* and *Richard Thalman, Special Agent, IRS vs. Harold H. Tsukuno,* Respondent and *Ken Eto, Intervenor,* 72-2 USTC 9631 (D. Ct., N. Dist. Ill) has been decided on a fact situation virtually identical to the case at bar. In its decision the District Court held that the records of a taxpayer though in the possession of his accountant were still protected from the subpoena power of the IRS by the privilege of the taxpayer to assert the 5th Amendment. The petitioner contends that the above cited holding is the only result that will give full force and effect to the broad mandate of the 5th Amendment.

The Government relies on clearly distinguishable cases to premise its argument that documents must be in the actual possession of the owner to be afforded the protection of the 5th Amendment. It relies on *Johnson v. United States,* 228 U. S. 457; *Perlman v. United States,* 274 U. S. 7; and on *Burdeau v. McDowell,* 256 U. S. 465. In *Johnson* (supra) both title and possession of the documents had left the individual asserting the privilege when he conveyed them to the trustee in bankruptcy. While in *Perlman* (supra), the person asserting the privilege had published the contents of the documents when he made them his evidence at a public trial on a patent matter. It could also be argued that ownership of the documents had passed to the lower court

when the evidence was introduced. Finally, in *Burdeau* (supra) the compulsion asserted on the individual claiming the privilege was not that of the government but that of a private individual. None of the cases cited by the government are similar to the one at bar where it is apparent that the petitioner retained ownership but not possession while never making public the contents of the documents. On the contrary, the government has consistently shown possession as well as title in someone other than the individual asserting the privilege, a crucial distinction.

The petitioner, Lillian V. Couch, respectfully submits that the government has not made a strong enough case to destroy substantial rights granted to her by the 5th Amendment.

ARGUMENT

The petitioner, Lillian V. Couch, respectfully draws the attention of the Court to a decision of significance reported during the interim period after the filing of her brief and prior to the oral argument of the case at bar. The District Court for the Northern District of Illinois rendered an opinion in the case of *United States of America and Richard Thalman, Special Agent, IRS, Petitioners v. Harold H. Tsukuno, Respondent and Ken Eto, Intervenor, 72-2 U. S. T. C. 9631* (N. D. Ill., 1972), which case has a substantially similar fact situation to that of the present case. There Eto, the taxpayer, retained Tsukuno, an accountant, to prepare the former's tax returns. During the course of an investigation into the tax liabilities of Eto, Thalman, Special Agent, issued a summons to Tsukuno pursuant to 26 U. S. C. Section 7402 (b) and Section 7604 (a) ordering him to produce all of the

records of Eto in his possession for the use of the Internal Revenue Service. The records in the possession of Tsukuno were of two types: (1) the work papers developed and used by Tsukuno in preparation of Eto's returns and (2) the personal books and records of Eto used by Tsukuno.

As in the case at bar, the taxpayer intervened in the action brought by the IRS to enforce the summons and asserted his rights under the 5th amendment as well as alleging a privilege for communications between an accountant and his client. The assertion of an accountant —client privilege is not an issue in the case at bar, although it is interesting to note that the District Court found that there was no such federally recognized privilege.

In its consideration of whether or not the taxpayer's privilege against self-incrimination embraced personal records no longer in his possession, the District Court scrutinized the holding of this Court in Donaldson v United States [71-1 USTC paragraph 9173] 400 U. S. 517 (1971). The District Court reinterated that Donaldson was not;

> ". . . a case in which the subpoena seeks to obtain records *of the taxpayer* in the hands of his attorney or accountant which the courts have deemed the same as if they were in the possession of the taxpayer himself. See *Reisman v. Caplin* [64-1 USTC paragraph 9202], 375 U. S. 440, 84 S. Ct 508, 11 L. Ed. 459, and this court's recent decision in *Stuart v. United States,* et al., 5 Cir., 416 F. 2d 459; . . ." 418 F. 2d 1213, 1214 (5th Cir. 1969) [emphasis in original]."

The District Court went on to say that:

> "The clear implication of the statements above which distinguish *Donaldson* from cases such as the the instant one where the records sought belong to the taxpayer, or in which he had some "proprietary interest," is that the taxpayer may assert his Fifth Amendment privilege to prevent their production by his lawyer or accountant." 72-2 USTC paragraph 9631 at 85,507

Your petitioner, Lillian V. Couch, contends that the District Court was correct in its interpretation of *Donaldson* which is the same interpretation prayed for by her in her original brief to this Court. The District Court said in refusing to enforce the IRS subpoena as to Eto's personal records in the possession of Tsukano;

> "It also seems clear that a person's Fifth Amendment rights are not so lacking in substance that they disappear if a government agency can locate and subject to process records temporarily out of his possession."

The petitioner contends that the above is a necessary interpretation of *Donaldson* as well as the result dictated by the broad mandate of the 5th Amendment.

Although the government has argued that no privilege attaches to documents out of the possession of the owner, the cases cited for that proposition are all easily distinguishable from the case at bar. In *Johnson v. United States* 228 U. S. 456, the records of a bankrupt who sought to invoke the 5th Amendment had been conveyed to the trustee. Title and possession to the records had left the bankrupt. Mr. Justice Holmes stated (id at 458)

> "A party is privileged from producing evidence but not from its production . . . it is held that a criminal cannot protect himself by getting legal title to corporate books. But the converse proposition is by no means true that he may keep the protection from the introduction of documentary evidence that he would have had while he retained it after *title and possession* have gone to someone else" (italics added)

Likewise, *Perlman v. United States,* 247 U. S. 7, is inappropriate to the issue here in question. There Perlman had delivered to an Equity Court the exhibits and records in question for use as his evidence in a patent suit. The records had become part of the public record. Obviously the privilege had been lost by a communication of the substance of the documents to the public at large. It is equally true that title to the evidence had shifted from Perlman to the Court. Finally, in *Burdeau v. McDowell,* 256 U. S. 465, the reliance of the government is misplaced. The holding of that case is questionable. However, even as the opinion is there set forth it is not relevant to the case at bar. There a 3rd party broke into X's office and stole papers belonging to X. The papers then came into the possession of the government which sought to use them as the basis of a prosecution against X. X raised the question of his 5th amendment privilege but the Court ruled it was inapplicable saying the 5th amendment protects one only from the compulsion and acts of his government, not the compulsion and acts inflicted by a fellow citizen. In the case at bar, it is the compulsion inflicted on Mrs. Couch by the government that is the question, not that by a fellow citizen. The case is inapplicable as a precedent for the present question. Mr. Justice Holmes and Mr. Justice Brandeis in a strong dissent both stated that the results disturbed their

notions of fair play and decency while noting that records sought would be protected if in the possession of X.

In the cases mentioned above, *United States of America and Richard Thalman v. Harold E. Tsukuno and Ken Eto.* (supra) *Donaldson v. United States* (supra), *Johnson v. United States* (supra), *Perlman v. United States* (supra), the basis of the decisions rendered has been either the location of title to the documents or the knowing publication of the contents of the documents. None of the cases have been decided solely on the basis of physical location. In the case at bar the government has not demonstrated the relevance of the decisions it cites to the present fact situation. It has not been alleged that Mrs. Couch, petitioner, has forfeited or transferred her title. She has not been shown to have published the contents of the records so as to destroy her privilege. The government has demonstrated at most a change of location which is not sufficient in and of itself to cause a forfeiture of substantial rights.

The government in citing *Colton v. United States,* 306 F 2d 633 (CA 2), cert. denied 371 U. S. 951 implicitedly recognizes the merits of Mrs. Couch's contentions. Among other issues, attorney Colton had in his possession records of his clients, the Matters, which the government sought, the Court saying on that point,

> "Moreover, if a proper showing is made Colton will be able to raise the Matters' privilege against self-incrimination as basis for refusing to produce any independently pre-existing records or other documents turned over to the firm by the Matters if the

Matters could have refused to produce them under that privilege."
306 F2 633 at 639. (1)

The petitioner contends that if the protection of the Fifth Amendment is stripped away from her that the consequences will be a serious erosion of the rights of the individual vis a vis the power of the government. Addressing itself to this same situation the holding in *Application of J. M. House*, 144 F. Supp. 95, at 103, said;

> "The zealous prosecution of violations of the criminal laws is the business of the government. The field of taxation represents probably the greatest single area of contact between individuals and the force of the state. A slight invasion of the right against self-incrimination in this field has as great and baleful consequences upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life."

(1) See also *Application of House* 144 F. Supp. 95 (N. D. Calif. 1956). Title of workpapers made by accountant passed to taxpayers. Taxpayers put the documents in the possession of their attorney. The Government sought to obtain the documents from attorney by subpoena. Held that the documents are protected by taxpayer's 5th Amendment privilege as title is in taxpayers although possession is not.

CONCLUSION

In summary your petitioner contends that for the reasons above cited her documents in the possession of her employee are surrounded and protected by her privilege under the 5th Amendment as title has not shifted nor has a publication of the contents been made.

Respectfully submitted,

Lillian V. Couch,
By Counsel
Claude D. Carter,
John G. Rocovich, Jr.,
Gerald A. Dechow

MARTIN, HOPKINS AND LEMON

Counsel for Petitioner
Sixth Floor, Boxley Building
Roanoke, Virginia

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COUCH *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 71-889. Argued November 14, 1972—Decided January 9, 1973

Petitioner challenges an Internal Revenue Service (IRS) summons directing an accountant, an independent contractor with numerous clients, to produce business records that she had been giving to him for preparation of her tax returns from 1955 to 1968, when the summons was issued. The District Court and the Court of Appeals concluded that the privilege against self-incrimination asserted by petitioner was not available. *Held:* On the facts of this case, where petitioner had effectively surrendered possession of the records to the accountant, there was no personal compulsion against petitioner to produce the records. The Fifth Amendment therefore constitutes no bar to their production by the accountant, even though the IRS tax investigation may entail possible criminal as well as civil consequences. Nor does petitioner, who was aware that much of the information in the records had to be disclosed in her tax returns, have any legitimate expectation of privacy that would bar production under either the Fourth or Fifth Amendment. Pp. 5–14.

449 F. 2d 141, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a concurring opinion. DOUGLAS and MARSHALL, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–889

Lillian V. Couch, Petitioner, *v.* United States and Edward F. Jennings, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 9, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

On January 7, 1970, the Government filed a petition in the United States District Court for the Western District of Virginia, pursuant to 26 U. S. C. §§ 7402 (b) and 7604 (a),[1] seeking enforcement of an Internal Revenue summons in connection with an investigation of petitioner's tax liability from 1964–1968. The summons

[1] SEC. 7402. JURISDICTION OF DISTRICT COURTS.

. . . . .

"(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

"SEC. 7604. ENFORCEMENT OF SUMMONS.

"(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

was directed to petitioner's accountant for the production of:

> "All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer." [2]

The question is whether the taxpayer may invoke her Fifth Amendment privilege against compulsory self-incrimination to prevent the production of her business and tax records in the possession of her accountant. Both the District Court [3] and Court of Appeals for the Fourth Circuit [4] held the privilege unavailable. We granted certiorari, — U. S. —.

Petitioner is the sole proprietress of a restaurant. Since 1955 she had given bank statements, payroll records, and reports of sales and expenditures to her accountant, Harold Shaffer, for the purpose of preparing her income tax returns. The accountant was not petitioner's personal employee but an independent contractor with his own office and numerous other clients who compensated him on a piecework basis. When petitioner surrendered possession of the records to Shaffer, she, of course, retained title in herself.

During the summer of 1969, Internal Revenue Agent Dennis Groves commenced an investigation of petitioner's

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[2] Appendix pp. 59–60.

[3] The District Court held that "since at the time the summons was served, the taxpayer, Lillian V. Couch, was not in possession of the books, records and documents described in the summons, she may not assert any Fifth Amendment privilege against self-incrimination as a bar to the enforcement of the summons." Appendix, pp. 6, 11. The opinion of the District Court (WD Va.) is not reported.

[4] The Court of Appeals also noted that the answer to petitioner's Fifth Amendment contentions lay in the fact that "the records were not in the intervenor's [taxpayer's] possession but were in the custody of her accountant," 449 F. 2d 141. — (197–).

tax returns. After examining her books and records in Shaffer's office with his permission, Groves found indications of a substantial understatement of gross income. Groves thereupon reported the case to the Intelligence Division of the Internal Revenue Service.

Special Agent Jennings of the Intelligence Division next commenced a joint investigation with Groves to determine petitioner's correct tax liability, the possibility of income tax fraud and the imposition of tax fraud penalties, and, lastly, the possibility of a recommendation of a criminal tax violation. Jennings first introduced himself to petitioner, gave her *Miranda* warnings as required by IRS directive, and then issued the summons to Shaffer[5] after the latter refused to let him see, remove, or microfilm petitioner's records.

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[5] The summons, which is printed in full in Appendix, pp. 59–60, was issued on August 18, 1969, pursuant to 26 U. S. C. § 7602, which provides:

"EXAMINATION OF BOOKS AND WITNESSES.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

When Jennings arrived at Shaffer's office on September 2, 1969, the return day of the summons, to view the records, he found that Shaffer, at petitioner's request, had delivered the documents to petitioner's attorney. Jennings thereupon petitioned the District Court for enforcement of the summons, and petitioner intervened, asserting that the ownership of the records warranted a Fifth Amendment privilege to bar their production.[6]

I

It is now undisputed that a special agent is authorized, pursuant to 26 U. S. C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences.[7] In *Donaldson* v. *United States*, 400 U. S. 517 (1971), the Court upheld such a summons, noting that:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. . . . There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. . . . To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw

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[6] Petitioner also claimed that enforcement of the summons would violate her Fourth Amendment right to be secure from unreasonable searches and seizures. We agree with the government, however, that "this claim is not further articulated and does not appear to be independent of her Fifth Amendment argument." Gov. Brief, pp. 21–22. See part IV, *infra*.

[7] There is clearly the joint civil and possibly criminal investigatory purpose in the instant case, see p. —, *supra*.

that line and thus to stultify enforcement of federal law." 400 U. S., at 535–536.*

The Court in *Donaldson* noted that the taxpayer there had attempted to intervene, pursuant to Fed. Rule Civ. Proc. 24 (a)(2), to bar production of records "in which the taxpayer had no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer." 400 U. S. 523. The Court quite properly concluded that, under these facts, no absolute right to intervene existed. 400 U. S., at 530–531. The instant case, however, presents a different question. Here petitioner does own the business records which the Government seeks to review and the courts below did permit her to intervene. The essential inquiry is whether her proprietary interest further enables her to assert successfully a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite the fact that the records no longer remained in her possession.

II

The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated. *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and

* *Donaldson* cautioned only that the summons be issued in good faith and prior to a recommendation for criminal prosecution. 400 U. S., at 536. Neither of those conditions is successfully challenged here.

proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth. *United States* v. *White*, 322 U. S. 694, 698 (1944). The Court has thought the privilege necessary to prevent any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullman* v. *United States*, 350 U. S. 422, 428 (1956).

In *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55 (1964), the Court articulated the policies and purposes of the privilege:

> ". . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load.' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' . . ."

It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself":

it necessarily did not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from *him*." *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant.[9] He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production. Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. In the present case, no "shadow of testimonial compulsion upon or enforced communication by the accused" is involved. *Schmerber* v. *California*, 384 U. S. 757, 765 (1966).

The divulgence of potentially incriminating evidence against petitioner is naturally unwelcomed. But petitioner's distress would be no less if the divulgence came

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[9] Technically the order to produce the records was directed to petitioner's attorney since, after the summons was served upon the accountant, he ignored it and surrendered the records to the attorney. But constitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them. *See United States* v. *Zakutansky*, 401 F. 2d 68, 72 (CA7 1968), cert. denied, 393 U. S. 1021; *United States* v. *Lyons*, 442 F. 2d 1144 (CA1 1971).

not from her accountant but from some other third party with whom she was connected and who possessed substantially equivalent knowledge of her business affairs. The basic complaint of petitioner stems from the fact of divulgence of the possibly incriminating information, not from the manner in which or the person from whom it was extracted. Yet such divulgence, where it did not coerce the accused herself, is a necessary part of the process of law enforcement and tax investigation.

III

Petitioner's reliance on *Boyd* v. *United States*, 116 U. S. 616 (1886), is misplaced. In *Boyd*, the person asserting the privilege was in possession of the written statements in question. The Court in *Boyd* did hold that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime," violated the Fourth and Fifth Amendments. 116 U. S. 630. That case did not, however, address or contemplate the divergence of ownership and possession,[10] and petitioner concedes that court decisions applying *Boyd* have largely been in instances where possession and ownership conjoined,[11] see, *e. g.*, *Hill* v. *Philpott*, 445 F. 2d 144 (CA7 1971); *U. S.* v. *Judson*, 63-2 USTC 9658 (CA9 1963).[12] In

[10] A later Court commenting on the *Boyd* privilege noted that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege or *at least in his possession in a purely personal capacity.*" *United States* v. *White*, 322 U. S. 694, 699 (1944). (Emphasis added.)

[11] Petitioner's Brief, pp. 13-14.

[12] See also *United States* v. *Cohen*, 388 F. 2d 464, 468 (CA9 1967), where the court, in upholding the right of a possessor, nonowner to assert the privilege, noted that "it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege

Boyd, the production order was directed against the owner of the property who, by responding, would have been forced "to produce and authenticate any personal documents or effects that might incriminate him." *United States* v. *White*, *supra*, at 698. But again we reiterate that in the instant case there was no enforced communication of any kind from any accused or potential accused.

Petitioner would, in effect, have us read *Boyd* to mark ownership, not possession, as the bounds of the privilege,[13] despite the fact that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter, conversations in which the accountant took notes, in addition to the accountant's own workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections.

Other precedents debated by the parties lend no support to petitioner's contention that ownership of docu-

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to prohibit." Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate.

We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege.

[13] Petitioner's Brief, pp. 11–17.

ments should determine the availability of the privilege.[14] In *Perlman* v. *United States*, 247 U. S. 7 (1918), the Court held the privilege unavailable to a party seeking to suppress the admission of incriminating documents and exhibits before a grand jury. The movant's expectations of privacy in the exhibits had, according to the Court, been destroyed when he voluntarily surrendered the exhibits as evidence in a patent infringement case he had earlier brought in Federal District Court. Peti-

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[14] *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), also debated and cited in the briefs, held that the government may retain for use against their owner in a criminal proceeding incriminating documents which were stolen by private individuals, without any governmental knowledge or complicity, and turned over to the government. The Court, in denying the owner's privilege, alluded primarily to the absence of any governmental compulsion against the accused, the precise factor considered in the instant case. It is true, as petitioners argue, that the case turns somewhat on a discussion of governmental versus private compulsion and invasion, but it is equally true that the Court in *Burdeau* failed to find any impermissible public compulsion on the owner in his absence of possession: "We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search and seizure, nor would it amount to compelling the accused to testify against himself." 256 U. S., at 476.

In *Johnson* v. *United States*, *supra*, the Court held that the books and records of a bankrupt transferred to a trustee in bankruptcy could be used as evidence against the bankrupt in a prosecution for concealing money from the trustee. Unlike the instant case, both title and possession passed in that transfer and the records were, in one sense, "published" by it. But the Court, in denying the privilege, recognized that the transfer also succeeded in removing the important element of personal compulsion against the accused, 228 U. S. 459, just as, in this case, the nature of the divestment of possession did.

tioner's claims of ownership failed to overcome this fact. The Court noted pertinently:

> "But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosesoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the 'physical or moral compulsion' exerted." 247 U. S. 15.

Petitioner argues, nevertheless, that grave prejudice will result from a denial of her claim to equate ownership and the scope of the privilege.[14] She alleges that "if the IRS is able to reach her records the instant those records leave her hands and are deposited in the hands of her retainer whom she has hired for a special purpose then the meaning of the privilege is lost."[15] That is not, however, the import of today's decision. We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against state compulsions upon the

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[14] *Id.*, p. 13. At oral argument petitioner raised a similar concern: "The Government goes so far to contend, I believe, with their theory that any time it is out of your actual physical possession, it is subject to subpoena . . . . If I were helping you across Constitution Avenue by carrying your briefcase, the Government holds that they could hand me a summons in the middle of Constitution Avenue and seize your documents to use against you in a criminal trial." Tr. of Oral Arg., p. 14.

individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.[16] But this is not the case before us. Here there was no mere fleeting divestment of possession: the records had been given to this accountant regularly since 1955 and remained in his continuous possession until the summer of 1968 when the summons was issued.[17] Moreover, the accountant himself worked neither in petitioner's office nor as his employee.[18] The length of his possession of petitioner's

[16] See, *e. g.*, *Schwimmer* v. *United States*, 232 F. 2d 855 (CA8 1956), which involved an attorney's partially successful motion to quash two subpoenas *duces tecum* issued in a grand jury proceeding against a corporation where the attorney had stored his office files. See also *United States* v. *Guterma*, 272 F. 2d 344 (CA2 1959), concerning the storage of taxpayer's personal records in a safe in offices of a corporation which the taxpayer had served as Chairman of the Board. Only the taxpayer and an indicted co-defendant knew the combination of the safe, and the corporation had no access to it. The Court of Appeals upheld the taxpayer's assertion of Fifth Amendment privilege as to his personal records in the face of a grand jury subpoena directed to the corporation.

Petitioner argues these cases support her position (Brief, pp. 14–15); the Government argues they can be distinguished from the instant case as involving mere custodial safekeeping of records, not disclosure of their information to a third person (Brief, p. 21). We refrain from judging the merits of such distinctions today.

[17] Tr. of Oral Arg., p. 31.

[18] As we noted, *supra*, p. —, his status is that of an independent contractor. He actually did "very little work for the petitioner," had many other clients, and was compensated by the job. Tr. of Oral Arg., p. 8.

This is a significant point. The Government noted in oral argument:

"In the Internal Revenue Service practice, so long as the taxpayer has retained possession of the records and they are being used only by his full-time employees or others on the taxpayer's premises, with-

records and his independent status confirm the belief that petitioner's divestment of possession was of such a character as to disqualify her entirely as an object of any impermissible Fifth Amendment compulsion.

IV

Petitioner further argues that the confidential nature of the accountant-client relationship and her resulting expectation of privacy in delivering the records protect her, under the Fourth and Fifth Amendments, from their production. Although not in itself controlling, we note that no confidential accountant-client privilege exists under federal law, and no State-created privilege has been recognized in federal cases. *Falsone* v. *United States*, 205 F. 2d 734 (CA5 1953), cert. denied, 346 U. S. 864; *Gariepy* v. *United States*, 189 F. 2d 459, 463-464 (CA6 1951); *Himmelfarb* v. *United States*, 175 F. 2d 924, 939 (CA9 1949), cert. denied, 338 U. S. 860; *Olender* v. *United States*, 210 F. 2d 795, 806 (CA9 1954). Nor is there justification for such a privilege where records relevant to income tax returns are involved in a criminal investigation or prosecution. In *Boyd*, a pre-income tax case, the Court spoke of protection of privacy, 116 U. S., at 630, but there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he

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out the taxpayer having relinquished possession or control of the records, we ordinarily in those situations issue the summons to the taxpayer, because it is the taxpayer who has the dominion over the records and the authority to return the summons. And if the taxpayer chooses to plead the privilege against self-incrimination, that is up to the taxpayer." Tr. of Oral Arg., p. 30.

knowingly assists in the preparation of a false return. 26 U. S. C. § 7602 (2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, either for Fourth [19] or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.

V

The criterion for Fifth Amendment immunity remains not the ownership of property, but the "physical or moral compulsion exerted." *Perlman, supra*, at 15. We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.[20] It is important, in applying constitutional principles,

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[19] See n. 6, *supra*. The summons satisfied the requirements in *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964), and, as explained above, the necessary expectation of privacy to launch a valid Fourth Amendment claim does not exist. *Katz* v. *United States*, 389 U. S. 347 (1967).

[20] The dissenting opinion of MR. JUSTICE MARSHALL implies that the Court has created a "bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession." MARSHALL, J., dissenting, *infra*, p. —. This implication does not reflect accurately the position of the Court. Indeed, it ignores the language of the Court on pages 11–13, and notes 15–18, *supra*. We do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids. Yet, contrary to any intimation in the dissent, we do not adopt any *per se* rule. We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court.

to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues.

The judgment of the Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71-889

Lillian V. Couch, Petitioner, v. United States and Edward F. Jennings, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 9, 1973]

MR. JUSTICE BRENNAN, concurring.

I join the opinion of the Court on the understanding that it does not establish a *per se* rule defeating a claim of Fifth Amendment privilege whenever the documents in question are not in the possession of the person claiming the privilege. In my view, the privilege is available to one who turns records over to a third person for custodial safekeeping rather than disclosure of the information, *United States* v. *Guterma*, 272 F. 2d 344 (CA2 1959), cf. *Schwimmer* v. *United States*, 232 F. 2d 855 (CA8 1956); to one who turns records over to a third person at the inducement of the Government, *Stuart* v. *United States*, 416 F. 2d 459 (CA5 1969); to one who places records in a safety deposit box or in hiding; and to similar cases where reasonable steps have been taken to safeguard the confidentiality of the contents of the records.* The privilege cannot extend, however, to the

*In some of these instances, to be sure, the person claiming the privilege would not himself have been the subject of direct government compulsion. And there is no doubt that the Fifth Amendment is concerned solely with *compulsory* self-incrimination. But surely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without

protection of a taxpayer's records conveyed to a retained accountant for use in preparation of an income tax return, where the accountant is himself obligated to prepare a complete and lawful return. 26 U. S. C. § 7206 (2). It is clear on the facts of this case that the taxpayer has voluntarily removed these records from that "private enclave where [she] may lead a private life . . . ," *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964), quoting *United States* v. *Grunewald*, 233 F. 2d 556, 581–582 (CA2 1956) (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957), and for that reason I would affirm the judgment below.

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requiring the owner to take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view, to incriminate himself within the meaning of the Fifth Amendment.

SUPREME COURT OF THE UNITED STATES

No. 71–889

Lillian V. Couch, Petitioner, v. United States and Edward F. Jennings, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 9, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I cannot agree with the majority that the privilege against self-incrimination was not available to the petitioner merely because she did not have possession of the documents in question and was not herself subject to compulsory process. The basic concerns which, in my opinion, underlie the privilege are more subtle and far-reaching than mere aversion to the methods of the Inquisition and the Star Chamber and their modern counterparts.[1] The decision today sanctions yet another tool of the ever-widening governmental invasion and oversight of our private lives. As I urged in dissent in *Warden* v. *Hayden*, 387 U. S. 294, 325, without the right of privacy "the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid."

I

By looking solely to the historical antecedents of the privilege and focusing on "the ingredient of personal compulsion," the majority largely ignores the interplay of the fundamental values protected by the Fourth and Fifth Amendments. As early as 1885 the Court recog-

[1] This is not to say, of course, that we must not be acutely alert to any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann* v. *United States*, 350 U. S. 422, 428 (1956). See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

nized that issues often cannot be pigeonholed within one amendment or the other, thereby foreclosing consideration of related policies. *Boyd* v. *United States*, 116 U. S. 616. In dealing with the compulsory production of a private paper for use in a forfeiture proceeding, the Court stated:

> "The principles laid down [in *Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." *Id.*, at 630.

Although the subpoena in *Boyd* was directed at the person asserting the privilege, that fact cannot be allowed to obscure the basic thrust of the Court's reasoning: the Fourth and Fifth Amendments delineate a "sphere of privacy" which must be protected against governmental intrusion.[2] We confirmed in *Murphy* v. *Waterfront*

[2] The Court in *Boyd* also stated that it was unable "to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the

Commission, 378 U. S. 52, 55, that "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' " is a fundamental policy underlying the Fifth Amendment.

The majority contends, however, that petitioner cannot reasonably claim "an expectation of protected privacy or confidentiality." The reasons asserted for this position overlook the nature of the accountant-client relationship. The accountant, an agent for a specified purpose—*i. e.*, completing the petitioner's tax returns—bore certain fiduciary responsibilities to petitioner. One of those responsibilities was not to use the records given him for any purpose other than completing the returns. Under these circumstances it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.[3]

I defined what I believe to be the boundaries of this right to privacy in *Warden* v. *Hayden*, *supra*, at 323:

"The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual

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clear intent and meaning of those terms." 116 U. S., at 633. Subsequent decisions, however, have refused to apply the privilege to bar the introduction of "testimonial" evidence where the author no longer has any property rights or a valid claim to confidentiality and privacy. See, *e. g.*, *Perlman* v. *United States*, 247 U. S. 7; *Johnson* v. *United States*, 228 U. S. 457. Obviously, the Court is not disposed to reconsider those decisions as they apply to instances where the author has not knowingly and intelligently waived his privilege against self-incrimination. In any event, I do not believe it is necessary to reach that issue here because, as I will discuss below, I believe that the petitioner has a valid claim to confidentiality and privacy.

[3] The majority states that what information to disclose in the petitioner's tax returns is largely in the accountant's discretion. Therefore, it argues, the accountant's own need for self-protection (to answer a possible charge of assisting in the preparation of a

> (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a non-descript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing."

The majority, by the seeming implications of its opinion, has cleared the way for investigatory authorities to compel disclosure of facets of our life we heretofore considered sancrosanct. We are told that "situations may well arise where the relinquishment of possession is so temporary and insignificant as to leave person compulsions upon the accused subtantially intact." I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents. Are we now to encourage meddling by the government and ever more ingenious methods of obtaining access to sought after materials? The premium now will be on subterfuge, on bypassing the master of the domain by spiriting the materials away or compelling disclosure by a trusted employee or con-

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false return) would often require the right to disclose the information given him. It may be that the accountant's fiduciary responsibilities must yield in this event, but that was not the case here.

fidant.[1] Inevitably, this will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that we have considered crucial to our democracy.

II

The decision may have a more immediate impact which the majority does not consider. Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records, however, he must forego such assistance. To my mind, the majority thus attaches a penalty to the exercise of the privilege against self-incrimination. It calls for little more discussion than to note that we have not tolerated such penalties in the past. Cf. *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U. S. 580; *Gardner* v. *Broderick*, 392 U. S. 273.

III

Thus, I would reverse the decision below, finding that the subpoena violated both petitioner's Fourth and Fifth Amendment rights.[2] I offer one more observation. The

[1] The majority notes that "the accountant himself worked neither in petitioner's office nor as his employee." I cannot see how that factor bears on whether the "ingredient of personal compulsion against the accused" is present, or whether the accountant was a confidant. The majority would seem to suggest, however, that petitioner, because her business did not call for or because she could not afford a full-time accountant, deserves less protection under the Fifth Amendment than a taxpayer more fortunately situated.

[2] In holding that "mere evidence" is not protected from seizure under the Fourth Amendment, the Court expressly refused to consider "whether there are items of evidential value whose very nature

majority cautions that respect for our constitutional principles is eroded "when they leap their proper bounds." We should not be swayed by the popular cry for a formalistic and narrow interpretation of those provisions which safeguard our fundamental rights.

It is a Constitution we are construing not a legislative-judicial code of conduct that suits our private value choices or that satisfies the appetite of prosecutors for more and more short cuts that avoid constitutional barriers. Those constitutional barriers and the judicial traditions supporting them that are the sources of the privacy we value so greatly. That privacy "protects people," not places, under the Fourth Amendment. *Katz* v. *United States*, 389 U. S. 347, 353. And as already noted *Boyd* v. *United States*, *supra*, held that when it comes to the "forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods"—that is an illustration of the manner in which "the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630.

One's privacy embraces what the person has in his home, his desk, his files, his safe as well as what he carries on his person. It also has a very meaningful relationship to what he tells any confidant—his wife, his minister, his lawyer, or his tax accountant. The constitutional fences of law are broken down by an ever-increasingly powerful government that seeks to reduce every person to a digit.

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precludes them from being the object of a reasonable search and seizure." *Warden* v. *Hayden*, *supra*, at 303. The answer to that question was clear to me when I dissented in that case and remains clear to me now.

SUPREME COURT OF THE UNITED STATES

No. 71-889

Lillian V. Couch, Petitioner, *v.* United States and Edward F. Jennings, Etc.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 9, 1973]

MR. JUSTICE MARSHALL, dissenting.

I cannot agree with the majority that the Constitution permits the Government to enforce the summons issued in this case. The opinion of the Court fails to articulate the basis of its result in a way that addresses the range of constitutional concerns involved.[1] The majority seems to create a bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession. Like MR. JUSTICE BRENNAN, I could not accept such a rule. However, the majority blurs the line by suggesting that temporary relinquishment of possession presents a different case, see *ante*, at —. The Court expressly disclaims the proposition that possession alone is determinative of the availability of constitutional protection for petitioner's papers. *Ante*, at —, and n. 16. But neither the opinion of the Court nor the concurring opinion of MR. JUSTICE BRENNAN supplies a clearly-articulated constitutional basis for the rule adopted. If the considerations which underly the Court's expressed concerns are stated explicitly, I think it is clear that the Court has failed to apply correctly the standards which

[1] In part this results from the conflation of petitioner's claims under the Fourth and Fifth Amendments. See *ante*, — n. 6. But the constitutional claims are complicated, and their articulation is difficult. The opinion of the Court does not, I believe, present an acceptable rationale for its holding.

it appears to find relevant.[2] I agree, of course, that possession does not define the limits of the protection which the Constitution affords to private papers, and add these comments to indicate how I would treat claims like petitioner's.

A. I begin with *Boyd* v. *United States*, 116 U. S. 616 (1886), whose continuing vitality is indicated by the majority's effort to distinguish it. That was a suit for the forfeiture of 35 cases of plate glass alleged to have been illegally imported. In the course of the forfeiture proceeding, the Government introduced into evidence an invoice of a prior shipment. The defendants objected on the ground that the use of the invoice violated their rights under the Fourth and Fifth Amendments, because the invoice was a private paper secured by a subpoena. This Court found a violation of both amendments.

One might interpret *Boyd* as holding that the Fifth Amendment prohibits the use of private papers in a criminal proceeding over the author's objection. The words of the Fifth Amendment surely can be read in that way. The use of the papers over objection "compel[s the author] in [a] criminal case to be a witness against himself." The compulsion occurs when the paper is introduced over objection, not when the paper is written or subpoenaed.

But that interpretation has not been adopted by this Court. See, *e. g.*, *Perlman* v. *United States*, 247 U. S.

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[2] It may be that everything in this opinion is implicit in the opinion of the Court. The majority recognizes the importance of the purposes of the transfer, *ante*, —, the steps taken to protect the privacy of the records, *ante*, —, and the ordinary operations of the recipient, *ante*, —. I would be pleased to discover that we had no serious disagreements about the guiding principles in this case, but only a relatively minor disagreement about its proper disposition.

7 (1918); *Johnson* v. *United States*, 228 U. S. 457 (1913). And in some possible cases, consistent application of that interpretation of *Boyd* might lead to results at odds with common sense.[3]

Another interpretation of *Boyd* has been accepted by this Court and by the leading commentators. See, *e. g.*, *Curcio* v. *United States*, 354 U. S. 118, 125 (1957); 8 Wigmore, Evidence § 2264 (McNaughton rev. 1961); McCormick, Evidence §§ 126–127 (2d ed. 1972). When a party produces potentially incriminating evidence in response to a summons or subpoena, he implicitly testifies that the evidence he brings forth is in fact the evidence demanded. "The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena. Requiring the

[3] For example, suppose a noted criminal lawyer walked into a police station and presented the desk sergeant with his handwritten confession to the arson of his neighbor's house. *Boyd*, read as suggested in the text, would bar the use of that document if, at trial, the defendant objected.

That case might be analyzed as a problem of waiver: did the manner in which the author revealed the paper indicate a knowing decision to surrender his rights? The cases which stand in the way of the simplest interpretation of *Boyd* might be treated similarly. But the "waiver" in those cases was not a waiver in the ordinary sense. In *Johnson*, for example, the defendant had been indicted for concealing money from his trustee in bankruptcy. The Bankruptcy Act required that he turn over his books to the trustee, and the books were used against Johnson in the criminal case. The transfer of the books was required if Johnson was to have the benefits of bankruptcy available to him. To make that transfer a waiver of Fifth Amendment rights would be to impose an unconstitutional condition.

Still, even if "waiver" is an inappropriate concept here, the underlying notion that someone may behave in a way which indicates a relinquishment of his constitutional rights is sound. I rely on it as the proper concept to use in analyzing claims like petitioner's. See *infra*, —.

custodian to identify or authenticate the document for admission in evidence merely makes explicit what is implicit in the production itself." *Curcio* v. *United States*, 354 U. S., at 125.

The potential for incrimination inherent in the act of production is illustrated by this case. The summons here called for the production of "all books . . . pertaining to the tax liability of" petitioner. Had the summons been directed to her, she would have implicitly testified, on producing some papers, that these were "all" the records sought. The Internal Revenue agents believed that she may have understated her income. Their belief might have been confirmed on examining all of her records, but not on examining only some of them. The records could then be used in a subsequent criminal prosecution for underreporting her income. If she produced only some of her books, though, she would be liable for contempt of the order. The Fifth Amendment was designed to prevent the Government from placing potential defendants in such a position. Cf. *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55 (1964).

These considerations operate only against the person in possession of the papers, as the majority correctly points out. In this case, the accountant to whom the summons was directed has made no claim that turning over the records he has might incriminate him, for example, by exposing him to the charge that he had perjured himself in representing that the return prepared for petitioner was correct to the best of his knowledge and belief, 26 U. S. C. § 6065 (1970), or that he had knowingly aided in the preparation of a false return, 26 U. S. C. § 7206 (2) (1970). Nor could he be held to have represented more than that he had produced all the records in his possession.

However, the accepted interpretation of *Boyd* has an odd sound to it. *Boyd* emphasized that the invoice there

was a private paper written by the defendants. Yet the accepted interpretation of the case makes the authorship and contents of the paper largely irrelevant. What is incriminating about the production of a document in response to an order is not its contents, as one might have thought, but the implicit authentication that the document is the one named in the order.[4] If that is the only way rationally to interpret *Boyd*, it might make sense to do so.[5] But it makes better sense to devise a rationale which focuses on the obvious concern of the case, the desire of the author of documents to keep them private.

B. This Court also held in *Boyd* that the Fourth Amendment was violated. Indeed, much of the opinion is devoted to a discussion of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, a landmark in the development of the prohibition against unreasonable searches and seizures. Here too the doctrinal basis of the holding is unclear, in part because the Court correctly perceived that "[i]n this regard the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630.

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[4] Another way of seeing the oddity of this interpretation is to consider whether the person who produces documents other than those called for has committed perjury. Perhaps he has, but the perjury is an unusual one. Yet perjury is the third horn of the "cruel trilemma" which the Fifth Amendment was designed to eliminate.

[5] Another interpretation of *Boyd* makes ownership crucial. A person who owns something has the right to exercise a great deal of control over it. When the Government seizes it, the owner is compelled to give up that right. This interpretation is consistent with the observation in *Boyd* that contraband and instrumentalities of crime can be seized because the Government has a superior property right in them. However, this interpretation runs into the same difficulties as the accepted one: in particular, it makes the authorship and content of the property irrelevant. And the emphasis on property rights in this area has since been abandoned. See, *e. g.*, *Warden* v. *Hayden*, 387 U. S. 294 (1967).

Boyd suggested that the Fourth Amendment prohibited the seizure of "mere evidence." 116 U. S., at 623–624. See *Gouled* v. *United States*, 255 U. S. 298 (1921). Searches for mere evidence were unreasonable even if such a search was sure to produce evidence leading to a conviction. The precise contours of the "mere evidence" rule were shaped by concepts of property law which we now see as outmoded. See *Warden* v. *Hayden*, 387 U. S. 294, 303–307 (1967). But those concepts attempted to define, however imprecisely, a sphere of personal privacy which the Government could not enter over objection. See, *e. g.*, *Gouled* v. *United States*, 255 U. S., at 304. And when this Court repudiated the "mere evidence" rule, it suggested that Fourth Amendment limitations might be devised precisely in terms of the interest in privacy, prohibiting the seizure of "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Warden* v. *Hayden*, 387 U. S., at 303. Cf. *Stanford* v. *Texas*, 379 U. S. 476, 485 (1965).

The Fourth and Fifth Amendments do not speak to totally unrelated concerns. Cf. *Griswold* v. *Connecticut*, 381 U. S. 479, 484–485 (1965); *Murphy* v. *Waterfront Commission*, 378 U. S., at 55. Both involve aspects of a person's right to develop for himself a sphere of personal privacy. Where the Amendments "run almost into each other," I would prohibit the Government from entering.[6] The problem, as I see it, is to develop criteria

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[6] I recognize that there is an alternate view, that unless a Fifth Amendment privilege in involved, the Fourth Amendment authorizes intrusion when it is not unreasonable. However, this Court has held that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches. Cf. *Camara* v. *Municipal Court*, 387 U. S. 523 (1967); *Terry* v. *Ohio*, 392 U. S. 1 (1968); *Stanford* v. *Texas*, 379 U. S. 476 (1965). The precise elements required of a Fifth Amendment violation need not coincide

for determining whether evidence sought by the Government lies within the sphere of activities which petitioner attempted to keep private. Cf. *Katz* v. *United States*, 389 U. S. 347, 351–352 (1967).

The first criterion, as *Hayden* suggests, is the nature of the evidence. Diaries and personal letters which record only their author's personal thoughts lie at the heart of our sense of privacy. In contrast, I see no bar in the Fourth or Fifth Amendments to the seizure of a letter from one conspirator to another directing the recipient to take steps which further the conspiracy. Business records like those sought in this case lie between those cases. We are not so outraged by the intrusion on privacy which accompanies the seizure of these records as we are by the seizure of a diary, yet the records could not easily be called "instrumentalities" of tax evasion, particularly if they are accurate.

Second, we must consider the ordinary operations of the person to whom the records are given. A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given. Again in contrast, a transfer to a trustee in bankruptcy or to a clerk of a court does not usually carry with it such expectations. That is how I would justify *Johnson* and *Perlman*. Here too the transfer in this case lies between the extremes. It would be relevant to a decision about the expectation of privacy that an accountant-client privilege existed under local law, but not determinative. Petitioner disclaimed reliance on such a privilege. Tr. of Oral Arg. 7. But I would think that, privileged or

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exactly with the elements of an invasion of privacy which should be considered unreasonable, and I see no reason to confine the sphere of privacy free from intrusion to just what the Fifth Amendment protects.

not, a disclosure to an accountant is rather close to disclosure to an attorney.

Third, the purposes for which the records were transferred is an element of an informed judgment about the author's interest in the privacy of the papers. That a transfer is compelled by practical considerations if the author is to claim benefits available under the law, seems to me quite important. If petitioner had sought to take advantage of some complicated provision of the tax laws, and needed the help of an accountant to do so, I would be quite reluctant to hold that the transfer of her records was a surrender of the privacy of the papers. But cf. *Johnson* v. *United States*, 228 U. S. 457 (1913). As I understand it, the majority's exception for temporary relinquishment of possession, and several of MR. JUSTICE BRENNAN'S exceptions, recognize the importance of this criterion.

Finally, we must take into account the steps that the author took to insure the privacy of the records. Cf. *Matter of Harris*, 221 U. S. 274, 280 (1911). Placing them in a safe deposit box is different from letting them remain for many years with an accountant.

It is not impossible that petitioner had indeed abandoned her claim to privacy in the papers sought by summons in this case. But the District Court and the Court of Appeals applied a rather rigid test which made possession alone conclusive. Those courts have more experience than we do with the ordinary practices of taxpayers, accountants, and Internal Revenue agents. They are therefore better able, in the first instance, to apply the criteria I believe are relevant, in light of their understanding of the ordinary practices in such cases. I would vacate the judgment and remand the case to the District Court for consideration of those criteria.